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IN THE

Supreme Court of the United States

October Term, 1967

No. 1152

INCORPORATED VILLAGE OF PORT JEFFERSON, ROBERT L. ROBERTSON and ROBERT E. LINK, on behalf of themselves and all others similarly situated owners, taxpayers, voters, residents, electors and citizens, in the Incorporated Village of Port Jefferson, in the Towns of Brookhaven, Smithtown, Huntington, Islip and Babylon and in every Village to be incorporated in said Towns hereafter,

Appellants

against

THE BOARD OF SUPERVISORS OF THE COUNTY OF SUFFOLK, the COUNTY TREASURER OF THE COUNTY OF SUFFOLK, and the RECEIVER OF TAXES OF THE TOWN OF BROOKHAVEN,

Appellees

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

IN THE

Supreme Court of the United States

October Term, 1967

No.

IN THE MATTER OF THE APPLICATION OF PAUL D. WILLCOX, as Village Treasurer of the Incorporated Village of Port Jefferson,

Appellant,

against

THE COUNTY TREASURER OF THE COUNTY OF SUFFOLK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

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No.

INCORPORATED VILLAGE OF PORT JEFFERSON, ROBERT L. ROBERTSON and ROBERT E. LINK, on behalf of themselves and all others similarly situated owners, taxpayers, voters, residents, electors and citizens, in the Incorporated Village of Port Jefferson, in the Towns of Brookhaven, Smithtown, Huntington, Islip and Babylon, and in every Village to be incorporated in said Towns hereafter,

Plaintiffs-Appellants,

against

THE BOARD OF SUPERVISORS OF THE COUNTY OF SUFFOLK, the COUNTY TREASURER OF THE COUNTY OF SUFFOLK, and the RECEIVER OF TAXES OF THE TOWN OF BROOKHAVEN,

Defendants-Respondents.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

October Term, 1967

No.

INCORPORATED VILLAGE OF PORT JEFFERSON, ROBERT L. ROBERTSON and ROBERT E. LINK, on behalf of themselves and all others similarly situated owners, taxpayers, voters, residents, electors and citizens, in the Incorporated Village of Port Jefferson, in the Towns of Brookhaven, Smithtown, Huntington, Islip and Babylon, and in every Village to be incorporated in said Towns hereafter,

Appellants,

against

THE BOARD OF SUPERVISORS OF THE COUNTY OF SUFFOLK, the COUNTY TREASURER OF THE COUNTY OF SUFFOLK, and the RECEIVER OF TAXES OF THE TOWN OF BROOKHAVEN,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of the Court of Appeals of the State of New York, entered on the 28th day of December, 1967, which, having affirmed the order of the Appellate Division, Second Judicial Department, affirming a judgment of the Supreme Court, Suffolk County, State of New York, sustained the constitutionality of Chapter 278 of the Laws of 1958, known as the Suffolk County Charter (referred to hereinafter as the Charter),

sustained the constitutionality of Sections 150 and 153(4) of the County Law of the State of New York, and construed and applied Article XII of the Charter, in this case, and to the prejudice of appellants, in a manner repugnant to the Fourteenth Amendment of the Constitution of the United States. Appellants, therefore, submit this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

Citations to Opinions Below

The opinion of the Supreme Court, Suffolk County (R. 236-250)* is reported in 44 Misc. (2d) 1083, 256 N.Y. 2d 36. The opinion of the Appellate Division, Second Judicial Department (R. 268-271), affirming the judgment of the Supreme Court, Suffolk County, is reported in 26 A.D.2d 700, 272 N.Y.S.2d 617. The decision of the Court of Appeals denying appellants' motion for a preference is reported in 19 N.Y.2d 898, 281 N.Y.S. 2d 90. The decision of the Court of Appeals later affirming the order of the Appellate Division is not yet reported. In affirming the order of the Appellate Division, however, the Court of Appeals delivered no opinion. Its judgment of affirmance is reprinted in Appendix C.

Jurisdiction

This action attacked two statutes of the State of New York, to wit, the Suffolk County Charter and Sections 150 and 153(4) of the County Law, as repugnant to the Federal Constitution. In the legislative apportionment phase of the case, this action was brought for a judgment declaring, and appellants charged in the courts below, that the

* Numbers in parentheses, unless otherwise indicated, refer to pages in the record to be certified and transmitted to this Court and filed with this Statement.

entire Charter, including Sections 201 and 203 thereof, and also Sections 150 and 153(4) of the County Law, were violative of the Fourteenth Amendment to the Constitution of the United States, as well as the Constitution of the State of New York. The grounds asserted were that the Suffolk County Board of Supervisors was unconstitutionally malapportioned by Sections 150 and 153(4) of the County Law and Sections 201 and 203 of the Charter and that the invalidity of Sections 201 and 203 of the Charter rendered wholly invalid the remainder of the Charter. In the police phase of the case, this action was brought also for a judgment further declaring, and appellants asserted below, that, if the Charter was not wholly invalid, Article XII of the Charter, including Sections 1206, 1207 and 1210(a), be declared repugnant to the Fourteenth Amendment to the Constitution of the United States as well as to the Constitution of the State of New York, if Article XII was held and enforced to appellants' disadvantage so as to deny to appellants certain rights relating to the transfer of police functions of the Incorporated Village of Port Jefferson and the exercise of such functions within the territory of said Village.

The Court of Appeals, without opinion, affirmed the order of the Appellate Division affirming the judgment of the lower court, both of which had been adverse to appellants' contentions of unconstitutionality on federal and state constitutional grounds. By its affirmance, the Court of Appeals sustained the constitutionality of the entire Charter including Sections 201 and 203, and Sections 150 and 153(4) of the County Law, and held and enforced Article XII of the Charter, including Sections 1206, 1207 and 1210(a), to appellants' disadvantage while also sustaining Article XII and Sections 1206, 1207 and 1210(a) as constitutional. The judgment of the Court of Appeals necessarily passed on and rejected appellants' constitutional allegations. The judgment of the Court of Appeals was entered on the 28th day of December, 1967. Notice of

appeal was filed by appellants with the clerk of Suffolk County, in the Court of Appeals, in the Appellate Division, Second Judicial Department, and in the Supreme Court, Suffolk County, on the 31st day of January, 1968.

Thus, lying before this Court for review is a judgment of the highest court of the State of New York which has upheld the validity and constitutionality of statutes of the State of New York, namely, the Charter and Sections 150 and 153(4) of the County Law, and which was adverse to appellants' contentions duly made below drawing them into question. This Court, therefore, has jurisdiction to review the judgment of the Court of Appeals by direct appeal, such jurisdiction being conferred on this Court by 28 U. S. Code, Section 1257(2). That this appeal, in both of its phases, lies properly before this Court for review is supported by numerous decisions which are representative of the two phases of this case. The challenge made in the legislative phase of the case to the Charter, including Sections 201 and 203, and to Seetions 150 and 153(4) of the County Law, is fully cognizable under 28 U. S. Code Section 1257(2). The term "statute of any state" used in Section 1257(2) has been held generally by prior decisions of the Supreme Court to embrace any legislative enactment, which the state has sanctioned or passed, not merely statutes of statewide application, such as the County Law Sections being challenged, but enactments, as in the case of the Charter, of purely local application, such as a city or town ordinance (*Reinman* v. *City of Little Rock*, 237 U. S. 171, 35 S. Ct. 511, 59 L. Ed. 900; *Zucht* v. *King*, 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194; *Goldblatt* v. *Town of Hempstead, New York*, 369 U. S. 590, 82 S. Ct. 987, 9 L. Ed. 2d 130) or a state bureau or court order (*Sultan Railway & Timber Company* v. *Department of Labor and Industries of State of Washington*, 277 U. S. 135, 48 S. Ct. 505, 72 L. Ed. 820; *Lathrop* v. *Donohue*, 367 U. S. 820, 81 S. Ct. 1826, 6 L. Ed. 2d 1191). Both the

Charter, which is applicable solely to Suffolk County, and the County Law, which applies statewide, are, therefore, statutes of the State of New York within the meaning of 28 U. S. Code Section 1257(2) and, on this appeal, are cognizable by this Court under that Section. The following decisions sustain the jurisdiction of the Supreme Court to review the legislative malapportionment question embodied in the challenge to the Charter and the County Law: *Maryland Committee For Fair Representation* v. *Tawes,* 377 U. S. 656, 84 S. Ct. 1429, 12 L. Ed. 2d 595; *Avery* v. *Midland County, Texas,* 388 U.S. 902, 87 S. Ct. 2106, 18 L. Ed. 2d 1342, lv. granted, 88 S. Ct. 229. The following decisions sustain the jurisdiction of this Court to review and determine the question also embodied in the legislative apportionment phase of this case of whether the rest of the sections of the Charter are so connected to and dependent upon Sections 201 and 203 that if Sections 201 and 203 are unconstitutional and void the whole Charter is incomplete, must fail and be treated also as unconstitutional and void: *Poindexter* v. *Greenhow,* 114 U. S. 270, 55 S. Ct. 903, 29 L. Ed. 185; *Spraigue* v. *Stern,* 118 U. S. 90, 6 S. Ct. 988, 30 L. Ed. 115; *Dorchy* v. *Kansas,* 264 U. S. 286, 44 S. Ct. 323, 68 L. Ed. 686; *Mayflower Farms, Inc.* v. *Ten Eyck,* 297 U. S. 266, 56 S. Ct. 457, 80 L. Ed. 675. Jurisdiction of this aspect of the case properly may be taken by this Court since the question of whether Sections 201 and 203 are separable from the Charter was not decided by the Court of Appeals, although squarely posed by this case, and hence there is no decision from that court to control this Court.

As to the police phase of this case in which certain Sections of Article XII of the Charter have been drawn into question as being repugnant to the Federal Constitution, particularly the Equal Protection and Due Process Clauses of the Fourteenth Amendment, but have been upheld as valid by a judgment of the highest court in New York, the following decisions sustain the jurisdiction

of this Court to review such judgment: *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239; *Schroeder* v. *City of New York*, 371 U. S. 208, 83 S. Ct. 279, 9 L. Ed. 2d 255.

Constitutional and Statutory Provisions Involved

The constitutional provisions involved in this appeal are the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States of America.

The statutes involved are: Sections 150 and 153(4) of the County Law of the State of New York, the Suffolk County Charter, including Sections 201 and 203 thereof, and Article XII thereof, particularly Sections 1206, 1207(1) and 1210(a); and the Village Law of the State of New York, Sections 34 and 188a.

Said constitutional provisions and statutory provisions are set forth in Appendix A.

Questions Presented

1. Where the Charter was enacted by the State Legislature for the single object of providing a complete scheme of government for Suffolk County and the governmental scheme is dependent upon and keyed to the governing body, the County Board of Supervisors, which not only is made the legislative and policy determining body of the County by Section 201 but has conferred on it powers to make appropriations, levy taxes and appoint department members; and where, by the provisions of Section 201, towns are given representation on the County Board of Supervisors as it is made up of the supervisors of the ten towns of the County; and where, by the provisions of Section 203, each supervisor is given one vote and by a vote of

not less than a majority of all the supervisors, local laws and resolutions may be adopted; and where the five eastern towns of Suffolk County, each with a vote on the County Board of Supervisors equal to the vote possessed by each of the five western towns of the County, are disparate from the western towns: in that (as of 1960 statistics) the five eastern towns contained only 61,048 residents or ten per cent of the population of the County as against 650,736 residents or ninety per cent of the population in the five western towns; in that the five eastern towns, consisting of rural vacant land used mainly for agriculture, paid (as of 1962) only ten per cent of the taxes collected in the County as against ninety per cent paid by the five urbanized western towns with a great variety of land uses and greatest taxable valuations; in that the five eastern towns voted against and are not included in or concerned with the County Police District while the five western towns voted for and are included in said Police District:

a. are Sections 201 and 203 of the Charter violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States as providing and resulting in disparity of representation on the County Board of Supervisors? And, if so,

b. is the entire Charter also rendered inoperative and unconstitutional because the unconstitutional Sections 201 and 203 are so connected with the object of the Charter and the governmental scheme that they are essential to the Charter and inseparable from it and, without them, the other provisions of the Charter cannot effectuate its object and must fail?

c. In view of the above described differences between the five eastern towns and the five western towns and the constitution of the County Board of Supervisors, are Sections 150 and 153(4) of the County Law, in providing that the supervisors of towns and cities in a county shall con-

stitute the board of supervisors of the county and that action shall be taken by the majority vote of the total membership of the board, repugnant to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States because they, too, provide and result in disparity of representation on the County Board of Supervisors?

2. Where, pursuant to Section 1206(2) of the Charter the electors of every incorporated village in Suffolk County were extended the right in 1958 to vote on whether to transfer the police functions of their village to the Suffolk County Police Department and whether to be included or not in the Suffolk County Police District and where Article XII of the Charter is construed, applied and enforced to deny this same right in 1963 to the individual appellants, Robert L. Robertson and Robert E. Link, and other electors similarly situated in the Incorporated Village of Port Jefferson, which was incorporated in 1963, is Article XII of the Charter violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States as favoring the electors of other incorporated villages in Suffolk County by granting them rights not accorded to the individual appellants and other similarly situated electors in the Incorporated Village of Port Jefferson?

3. Where Article XII of the Charter provides in Section 1207(1) that an election made by a town or village in 1958 to transfer its police functions to the Suffolk County Police Department and to be included in the Suffolk County Police District "shall be irrevocable", and where Article XII provides in Section 1210(a) for an annual levy of taxes on real estate within the Suffolk County Police District to pay the expenses of the Suffolk County Police Department; and where Article XII of the Charter is construed, applied and enforced so that the 1958 election by voters of

Police District towns or villages permanently prevents future voters of individual Police District towns and villages, including the individual appellants, from electing to remove themselves from the Police District and from ever voting again on the matter of police functions and police taxes:

a. is Article XII of the Charter violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States in that it favors the 1958 class of electors in Police District towns and villages and disfavors post 1958 electors in such towns and villages? And

b. is Article XII of the Charter violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States on the ground that it is arbitrary and unreasonable and deprives the individual appellants of property without due process of law through a permanent form of taxation as to which they have no vote or voice?

4. Where the Village Law of the State of New York forms the Charter of all villages incorporated under it, where the appellant Incorporated Village of Port Jefferson is incorporated under it in 1963, after the Suffolk County Charter became effective in 1960, and where Article XII of the Suffolk County Charter is construed, applied and enforced to supersede and modify the Village Law of the State of New York and to supersede and modify the Charter and rights of the appellant Incorporated Village of Port Jefferson otherwise conferred on it by Sections 34 and 188a of the Village Law and accorded all other villages incorporated in the State of New York, i.e., under Section 34 of the Village Law to cease, on incorporation, to be part of the previously created County Police District and to be paid pro rata taxes collected since incorporation by the appellee County Treasurer for County Police District pur-

poses,* and under Section 188a of the Village Law to exercise police functions and establish a police department within its Village territory, is Article XII of the Suffolk County Charter violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States as discriminating against the appellant Incorporated Village of Port Jefferson and denying to this appellant the rights and the charter conferred on all New York villages by the Village Law under Sections 34 and 188a?

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* In the Courts below, this case was joined with the proceeding entitled "In the Matter of the Application of Paul D. Willcox, as Village Treasurer of the Incorporated Village of Port Jefferson, Appellant, against The County Treasurer of the County of Suffolk, Appellee." This proceeding, based on Article 78 of the Civil Practice Law and Rules of New York and Section 34 of the Village Law, and also Article XII of the Charter, was brought to exercise one of the rights conferred on New York villages by Section 34 of the Village Law: to compel the appellee County Treasurer of Suffolk County to pay to the appellant Village Treasurer in the proceeding pro rata taxes collected from real property within the Incorporated Village of Port Jefferson, since the incorporation of said Village, by said appellee for County Police Department expenses, such payment being required of the appellee by Section 34 of the Village Law. The case and proceeding, having in common as parties, the Incorporated Village of Port Jefferson and its Treasurer and the Suffolk County Treasurer, having in common questions of fact and law and involving the same state statutes, were tried, appealed and decided jointly in the courts below and are included in the record to be filed in this Court. The appellant in the proceeding, directly affected by the judgment of the Court of Appeals as to the operation of Article XII of the Charter on Section 34 of the Village Law and as to the validity of Article XII of the Charter and directly interested in the resolution by this Court of Question 4, is joining in the appeal by appellants in this case.

A brief Jurisdictional Statement in connection with the proceeding, mainly incorporating the statements in this Judicial Statement as they bear on Question 4 presented on this appeal, will follow at the conclusion of this Jurisdictional Statement.

Statement

The appellants, Robert L. Robertson and Robert E. Link, residents, electors, taxpayers and property owners in the Incorporated Village of Port Jefferson and voters in the Town of Brookhaven, and the appellant Incorporated Village of Port Jefferson, commenced this action in Supreme Court, Suffolk County, on December 18, 1963 (R. 257). The action was brought against the County Board of Supervisors and other County and Town officials on behalf of other persons similarly situated in the five western towns of Suffolk County, in the Incorporated Village of Port Jefferson and in villages to be incorporated subsequently in the five western towns (R. 6, 7, 22, App. B, B-1, B-2, B-17).

In their complaint (R. 6-38), reprinted also in Appendix B, appellants alleged in their second cause of action (R. 21-22, App. B, B-15-B-16) and in their third cause of action (R. 22-30, App. B, B-17-B-24) the federal *constitutional* questions described in Questions 1, 2, 3 and 4 above. Question 1 was raised in the legislative apportionment phase of appellants' case while Questions 2, 3 and 4 were raised in the police phase of the case. They were considered and determined adversely in all courts below.

As to Question 1 above:

Raising this Question in the legislative apportionment phase of their action, and specifically by the third cause of action in their complaint (R. 22-30, App. B, B-17-B-24), appellants charged, in substance, that Sections 201 and 203 of the Charter created and provided disparity of representation on the legislative and policy determining body of the County of Suffolk, to wit: the County Board of Supervisors, in violation of the "one person, one vote" principle of *Baker* v. *Carr*, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, and *Reynolds* v. *Sims*, 377 U. S. 533, 84 S. Ct. 362, 12 L. Ed. 2d 506, and in contravention of the Equal Protection

Clause of the Fourteenth Amendment to the Constitution of the United States (and the Equal Protection Clause of the Constitution of the State of New York). Appellants alleged in the third cause of action in their complaint and proved at the non-jury trial held May 4, 1964, in the Supreme Court, Suffolk County, that there were great and glaring disparities between the five eastern and five western towns: only ten per cent of the population of the County, or 61,048 people, resided in the five eastern towns while ninety per cent of the population, or 650, 736 people, resided in the five western towns (R. 24-25, 120, 121; App. B, B-19); of the $109,588,513 in taxes collected from the County in 1962, about ninety percent, or $91,000,000, was paid by the five western towns (R. 124-125; p. 39 entitled "Town and County Property Tax Warrants 1962" of Appellants' Exhibit 16); the greatest taxable valuations were in the five western towns (pp. 7-8 of Appellants' Exhibit 16); there was a greater urbanization in the five western towns, density, and a variety of land uses than in the preponderantly agricultural five eastern towns, outside of Greenport, which were relatively rural, consisting of vacant, sparsely populated land lacking urbanization (R. 25, 123, 125-128; Appellants' Exhibit 17, pp. 13-22, map at pp. 30-31, entitled "Existing Land Use—1962" and map at pp. 29-30, entitled "Usable Open Space—1962"; App. B, B-19); the five western towns only voted for and were included in the County Police District (R. 24-25, 180, App. B, B-19). Appellants alleged and established that the makeup of the County Board of Supervisors is such that it is not and cannot be responsive to Police District matters and the needs of ninety per cent of the population of the County, such as requests from the five western towns for a revote, or as to their need for court facilities, or other matters (R. 20-27, 140, 142, 145-147, 231, Appellants' Exhibit 22; App. B, B-20-B-21). By virtue of the provisions of Sections 201 and 203 of the Charter, each of the elected supervisors from the ten towns of the County constitutes the County Board of Supervisors, has one equal vote, repre-

sents his town, not the population of the County, as to county matters, and each town represented by him has equal representation regardless of its population, needs or inclusion in the County Police District (R. 25, 137-138, App. B, B-19-B-20). In consequence of the composition and structure of the County Board of Supervisors, representation therein was grossly and unjustifiably disproportionate to the distribution of voting population, debased appellants' votes and other similarly situated in the five western towns, placed them in a position of constitutionally unjustifiable inequality and contravened the Fourteenth Amendment to the Constitution of the United States (R. 26-28, App. B, B-20-B-22). Appellants charged that Sections 201 and 203 of the Charter, which created the malapportioned governmental scheme, violated the Federal Constitution (R. 29-30, App. B, B-23-B-24). Appellants further charged that, since these Sections 201 and 203, which constitute, authorize and empower the governing body of Suffolk County, and prescribe its functions and voting procedure, are inseparable from the rest of the sections of the charter, since they are inextricably interwoven with the object of the Charter to provide a comprehensive governmental scheme for Suffolk County whose operation and success are keyed to the County Board of Supervisors created by Sections 201 and 203, as is apparent from an examination of the title, section and plan of the Charter, the balance of the section of the Charter fall and the whole of the Charter falls and is also unconstitutional and void if Sections 201 and 203 are unconstitutional and eliminated (R. 24, 28, 30, 221, 222, Appellants' Exhibit 14, App. B, B-18, B-22, B-24).

Still in the legislative apportionment phase of the action, the appellants also alleged that Sections 150 and 153(4) of the County Law, in similarly creating disparity of representation on the County Board of Supervisors, violated the "one person, one vote" principle and the Equal Protection Clause of the Federal Constitution (and the Equal Protection Clause of the State Constitution) (R. 23, 25-28, 29-30, App. B, B-18, B-20-B-22, B-23-B-24).

The prayer for relief, in this phase of the case, sought judgment declaring the entire Charter, including Sections 201 and 203, void, invalid and unconstitutional in violation of the Fourteenth Amendment and asked that appellees be restrained from exercising their powers under the unconstitutional Charter (R. 33-34, App. B, B-27-B-28). The same declaratory judgment and injunctive relief was asked as to Sections 150 and 153(4) of the County Law (R. 33-34, App. B, B-27-B-28).

The appellees Board of Supervisors and County Treasurer served their answer (R. 38-41). In paragraphs 11th and 13th of their answer (R. 40), they admitted the appellants' allegations in paragraph 38 of the complaint that Sections 201 and 203 of the Charter and the voting and other powers conferred on the County Board of Supervisors by said Sections are interwoven with and are essential to the entire scheme of the Charter (R. 24, App. B, B-18) and they admitted the allegations of paragraph 46 of the complaint that Sections 201 and 203 are inseparable from the remainder of the Charter (R. 28, App. B, B-22). Their answer, however, denied the invalidity and unconstitutionality of Sections 201 and 203 and the Charter and of the challenged Sections of the County Law (R. 40). The answer of appellee Receiver of Taxes (R. 41-43) denied appellants' allegations in this and other respects. The appellees, in all courts below, including the trial court, the Appellate Division and the Court of Appeals, contended in briefs and arguments that these statutes did not violate the Fourteenth Amendment, so that the constitutional issues were always in sharp focus before the courts below.

After the trial, the trial judge, in an opinion dated December 18, 1964, reported in 44 Misc. 2d 1083, 256 N.Y.S. 2d 36, recognized the constitutional issue raised by the complaint and involved in Question 1. He said at one point in the opinion: "As a third cause of action . . . the plaintiffs seek a declaration of the unconstitutionality of Sections 150 and 153(4) of the County Law and the entire

Suffolk County Charter, because of the disproportionate voting strength of the town supervisors on the County Board of Supervisors. This they claim constitutes a violation of the due process and equal protection clauses of both the State and Federal Constitutions." (R. 237-238); and he said at another point in the opinion: "In the third cause of action the court is asked to declare unconstitutional Sections 150 and 153(4) of the County Law and the entire Charter, particularly Sections 201 and 203, and 1206, 1207, and 1210(a) thereof, as being violative of the due process and equal protection clauses of both State and Federal Constitutions . . ." (R. 246). However, the trial judge held in favor of the constitutionality of the Charter and the challenged Sections of the County Law (R. 250) against the contentions of appellants.

Subsequently, on the appeal to the Appellate Division recognition again was given to the constitutional issue presented by Question 1 as well as the issue, also presented by this Question, of whether the unconstitutionality of Sections 201 and 203 results in the failure and unconstitutionality of the entire Charter. The Appellate Division, whose opinion is reported in 26 A. D. 2d 700, 272 N.Y.S. 2d 617, went to some pains to describe appellants' contentions: "that sections 201 and 203 of the County Charter (which deals with the constitution and voting procedure of the Board of Supervisors) are invalid because they violate the one-man, one-vote principle; that the invalidity of these sections makes the whole charter invalid, including Article XII, under which the County Police District was created; that the invalidity of the entire charter, including Article XII, makes section 34 of the Village Law the controlling statute; and that pursuant to that section the village ceased to be part of the County Police District when the village was incorporated." (R. 269). The Appellate Division, whose opinion will be remarked upon later, rejected appellants' contentions and upheld the constitutionality of the entire Charter and Sections 201 and 203 thereof.

As to Questions 2, 3 and 4 above:

In the other phase of this action, dealing with the rights of the individual appellants, Robert L. Robertson and Robert E. Link, and the appellant Incorporated Village of Port Jefferson, with respect to the police functions of said Village and police taxes imposed by appellees under Article XII, Section 1210(a), of the Charter, appellants charged in the second cause of action of the complaint * (R. 21-22, App. B, B-15-B-16), and also proved at the trial: that pursuant to Article XII of the Charter the County Police Department was created, effective January 1, 1960, to consist of the five western towns, including the Town of Brookhaven, and the villages therein and that the electors of all villages, at a 1958 referendum and pursuant to Section 1206(2) of the Charter, were afforded the right to vote on whether to transfer the police functions of their villages to Suffolk County Police Department and become part of the County Police District (R. 7-12, 19, 180, App. B, B-3-B-7, B-14); that on April 10, 1963, a part of the Town of Brookhaven became incorporated under the Village Law of the State of New York as the appellant Incorporated Village of Port Jefferson which Village was entitled to all the rights conferred on villages organized thereunder (R. 6-7, 11, 13, App. B, B-2, B-6, B-8), particularly to the right conferred by Sections 34 and 188a of the Village Law, Section 34 providing, in part, that a new village, on incorpora-

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* This second cause of action, in paragraph 32 of the complaint (R. 21, App. B, B-15), repeated all statements and allegations made in the first cause of action. By the first cause of action (R. 6-21, App. B, B-1-B-15) appellants invited the courts below to avoid the constitutional questions concerning Article XII of the Charter and to grant the relief requested (R. 30-32, App. B, B-25-B-26) that the Incorporated Village of Port Jefferson was not part of the County Police District, not subject to taxation under Section 1210(a) of the Charter, was empowered to establish a police department, and that appellants were entitled to the same right to vote other village electors had. The courts below denied this relief, reached and adversely determined the constitutional questions presented by the second cause of action.

tion, should cease to be part of a previously created municipal district and providing further that the treasurer of a county must pay to the treasurer of the village taxes collected since incorporation for municipal district purposes, and Section 188a providing that a village was empowered to exercise its police functions and establish a police department in its territory (R. 13-14, 15-16, App. B, B-8-B-9, B-10-B-11); that when the appellant Incorporated Village of Port Jeffreson became incorporated it ceased to be included in the County Police District, that its electors had the same right of election that was afforded all village electors to determine whether to transfer village police functions and become part of the County Police District, and that the electors of the Incorporated Village of Port Jefferson voted on October 17, 1963, not to transfer police functions to the County Police Department and not to become part of the County Police District (R. 14-15, 19, 96-97, 106-107, 164-165, 177-178, 202-216, App. B, B-9-B-10, B-14). Appellants alleged that no real property in the Incorporated Village of Port Jefferson, including that owned by individual appellants Robert L. Robertson and Robert E. Link, was subject to taxation for annual county police department expenses levied and collected by appellees pursuant to Section 1210(a) of the Charter and that said Section did not apply to the real property owned by appellants and others in the Incorporated Village of Port Jefferson (R. 14-15, 165-166, 178-179, App. B, B-9). On October 24, 1963, the Board of Trustees of the Incorporated Village of Port Jefferson resolved to establish a police department pursuant to Section 188a of the Village Law (R. 16, 108, 109, 216-220, 167, 179, App. B, B-11) which resolution was served on appellees (R. 17, 97, 167). Appellees refused to concede the position of the appellant Incorporated Village of Port Jefferson and asserted their intention to oppose said appellant (R. 17, App. B, B-12) and usurped the police functions of said appellant (R. 17, App. B, B-12) and performed them in the territory of said appellant against its

wishes (R. 99) and continued to levy taxes pursuant to Section 1210(a) of the Charter against real property owned by the individual appellants and others in said Village (R. 17-19, 165-166, 178-179, App. B, B-12-B-13).

On the basis of these allegations and proofs, appellants raised Questions 2, 3 and 4 by the second cause of action in the complaint, charging: that if Article XII of the Charter was held and applied in such manner as to deprive appellants Robert L. Robertson and Robert E. Link, and others similarly situated, as electors in the Incorporated Village of Port Jefferson, of an equal right and opportunity to vote on the question of whether to transfer police functions and become part of the County Police District as were extended to all other electors of incorporated villages, Article XII would be violative of the Fourteenth Amendment; or if Article XII of the Charter which provides in the last sentence of Section 1207(1) that a town or village election is "irrevocable" was held and enforced in such manner that appellants Robert L. Robertson and Robert E. Link and other similarly situated electors in the Incorporated Village of Port Jefferson are permanently precluded by the vote of 1958 electors from making an election as to inclusion in the County Police District or as to having their real property subjected to taxation under Section 1210(a) from County Police Department expenses, Article XII again would be violative of the Fourteenth Amendment; or if Article XII of the Charter were held and applied in such manner as to prevent the appellant Incorporated Village of Port Jefferson from exercising the rights, under Section 34 of the Village Law, to cease being part of the County Police District and to have repaid to its Treasurer taxes collected for municipal district purposes, and, under Section 188a of the Village Law, the right to establish its own police department, rights which were accorded to all villages in New York under the Village Law, Article XII again would be violative of the Fourteenth Amend-

ment. The prayer for relief, under the second cause of action, sought judgment declaring that the Charter, and the Sections of Article XII, to wit: Sections 1206, 1207 and 1210(a), were void, invalid and in violation of the Constitution of the United States if held and applied in any of the ways just described (R. 32-33, App. B, B-26-B-27). The complaint also sought judgment permanently restraining appellees from acting under Section 1210(a) of the Charter to levy and collect taxes against appellants' and others' property in the Incorporated Village of Port Jefferson to pay the annual expenses of the County Police Department (R. 31-32, App. B, B-25-B-26).

The answers of the appellees denied (R. 39, 43) the allegations of the unconstitutionality of Article XII of the Charter if held and enforced to appellants' disadvantage; however, the answer of the appellee Receiver of Taxes (R. 41) nevertheless admitted the allegations of paragraph 2 of the complaint (R. 6-7, App. B, B-2), that the appellant Incorporated Village of Port Jefferson, incorporated under the Village Law, was entitled to all the rights and powers and privileges conferred on villages organized thereunder.

The trial judge recognized in his opinion appellants' constitutional objections made by the second cause of action. His language was: "For a second cause of action, in the event that it is determined that the Village is still a part of the county police district, they ask that the Suffolk County Charter, particularly Sections 1206, 1207 and 1210(a) thereof which have to do with the creation, establishment and support of the Suffolk County Police District, be declared invalid as being violative of both the State and Federal Constitutions in many respects . . ." (R. 237). In another portion of the opinion, recognition again was given to the constitutional issues (R. 242-243). The trial judge went on to decide that appellants' contentions were without merit (R. 244-246).

On appeal, the Appellate Division, in these words also showed an awareness of the constitutional issues presented by appellants and involved in questions 2, 3 and 4: "Alternatively, plaintiffs contend . . . that even if the rest of the charter is valid, Article XII thereof (dealing with the County Police District) is unconstitutional for a variety of reasons, and that said section 34 consequently is controlling. . . . We see no merit in any of the attacks on article XII of the Charter on constitutional grounds" (R. 269-270).

From the adverse judgment of the trial court dismissing the complaint, including all its causes of action, appellants appealed to the Appellate Division, Second Judicial Department, and reasserted before the Appellate Division, in oral argument and briefs, as they had in arguments, trial and briefs before the trial court, their constitutional arguments and objections and the same constitutional questions now presented on this appeal. The Appellate Division, however, resolved all constitutional questions against appellants, and sustained the constitutionality of Article VII, though applying and enforcing it to the disadvantage of appellants, and sustained the constitutionality of the entire Charter. It did not decide that or whether Sections 201 and 203 were severable from the rest of the Charter, no express language or implication to this effect appearing in the opinion. In affirming the judgment of the lower court, which had held Sections 201 and 203 of the Charter and the entire Charter valid and constitutional and also sustained the validity and constitutionality of Sections 150 and 153(4) of the County Law, the Appellate Division necessarily decided adversely to appellants' contentions and upheld the constitutionality of all of these statutes as well. A word, however, will be said in the next paragraph concerning Section 203 of the Charter which the Appellate Division's opinion apparently conceded to be invalid but which concession, as appellants see the Appellate Division opinion in retrospect, probably has been erased so that Section 203, as far as the opinion of the Appellate Division is concerned, was held valid.

From the order of the Appellate Division, appellants appealed to the Court of Appeals where the same contentions made in the two courts below were made once more and the constitutional questions posed and presented again. The Court of Appeals delivered no opinion. Its judgment, however, in affirming the order of the Appellate Division which had affirmed the judgment of the Supreme Court, Suffolk County, was adverse to appellants and the constitutional contentions made by appellants. Necessarily the Court of Appeals considered the constitutional questions raised and the constitutional rights asserted by appellants and necessarily it resolved against them and determined that the entire Chafter, including Sections 201 and 203 thereof, was constitutional and valid, that Sections 150 and 153(4) of the County Law were constitutional and valid and that Article XII of the Charter was also constitutional and valid even though applied and enforced to the disadvantage of appellants. When, on or about November 1967, the appeal came before the Court of Appeals, this Court had already vacated the judgment of the three judge court in *Bianchi* v. *Griffing* (387 U. S. 97, 87 S. Ct. 1544, 18 L. Ed. 643). The vacatur of the three judge court judgment occurred on April 18, 1967, after the Appellate Division had rendered its opinion of July 12, 1966. It had been on the basis of the prior ruling of the *Bianchi* three judge court (238 F. Supp. 997, app. dism. 382 U. S. 15, 86 S. Ct. 52, 15 L. Ed. 2d 11) that Section 203 of the Charter was invalid as violative of the "one person, one vote" principle that the Appellate Division appeared forced to concede the invalidity of Section 203, for the Appellate Division expressly referred to this ruling (R. 270) and recited the direction of the three judge court to the County Board of Supervisors to reapportion as the reason for conceding the invalidity of Section 203. In their brief to the Court of Appeals, appellees argued that by vacating the judgment of the three judge court, this Court "re-

versed" the three judge court and that Section 203 (and also Section 201 of the Charter and the County Law) was valid and constitutional.* The judgment of the Court of Appeals against appellants' contentions to the contrary leads to the conclusion that the Court of Appeals accepted appellees' argument, regarded the Appellate Divisions' earlier concession of Section 203's invalidity as erased by the later vacatur of the three judge court judgment by this Court and viewed Section 203 as constitutional, as it also viewed the other statutes challenged by appellants. The Court of Appeals did not, impliedly or expressly, make any decision as to the separability of Sections 201 and 203 from the remainder of the Charter; and hence no state court decision controls this Court on the point.

At every stage and in every court below, appellants duly made their objections and posed the federal constitutional questions now before this Court. This appeal is properly before this Court.

The Questions are Substantial

All questions posed by this appeal are of overriding significance to every citizen of the United States since these questions affect the composition, procedure, representative character, rights, functions and charters of local governments under whose immediate jurisdiction he lives and works.

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* Following the direction of the *Bianchi* three judge court, the County Board of Supervisors, on August 8, 1966, adopted Local Law No. 4-1966 purporting to amend the Suffolk County Charter by creating the positions of additional representatives on the County Board and providing for calculating the vote the representatives of each town would have. The Local Law was adopted by the voters on November 8, 1966. However, Section 3 of the Local Law provided that it was to be deemed rescinded if the United States Supreme Court overruled the decision and order of the District Court. Since, according to the appellees and the County Attorney, the Supreme Court has "reversed" the three judge court, the Local Law, which purported to amend the Charter and reapportion the County Board of Supervisors, has been voided by its own terms.

As to Question 1:

This Question raises the dual issue of whether the Equal Protection Clause of the Fourteenth Amendment and the "one person, one vote" principle is applicable to legislative elective bodies at the municipal and county level and requires them, in particular, a county board of supervisors, to be apportioned according to the number of citizens represented and whether, if the Equal Protection Clause of the Fourteenth Amendment does apply to elected county and municipal governments, and the provisions of their Charters dealing with the composition of these bodies are held void and repugnant to the Fourteenth Amendment as providing for the unconstitutional apportionment of these governmental bodies, the remainder of their charters purporting to supply a complete system of government can or should be preserved as a workable system of government or a system of government intended by the state legislature with the key provisions relating to the legislative body eliminated and the object of the charter frustrated.

The initial issue concerning the applicability of the Equal Protection Clause to elected county government has not yet been resolved by this Court. Appellees in this case maintained before the Court of Appeals that this Court's decision in *Sailors* v. *Board of Education*, (387 U.S. 105, 87 S. Ct. 1549, 18 L. Ed. 2d 650) determined that the Equal Protection Clause did not apply to such state governmental bodies, and to the county governmental body in this case, and that, therefore, Sections 201 and 203 of the Charter were not repugnant to the Fourteenth Amendment. The briefest examination of this case shows this contention to be fallacious as applied to this appeal wherein the County Board of Supervisors is an elected, legislative body. In *Sailors* this Court decided only that the "one person, one vote" principle did not apply to an appointive, rather than elective, county school board which performs non-legislative functions. Further, in *Sailors*,

Mr. Justice Douglas expressly reserved the question whether the "one person, one vote" principle applies to a local legislative body, the very issue now brought up on this appeal. Therefore, this issue continues to be undetermined by this Court, and it is obvious from the fact that this Court granted certiorari in *Avery* v. *Midland County, Texas, supra*, in which a federal constitutional question was raised in connection with the apportionment of a county body, that this issue is considered by this Court to be of importance. If (and it is a big "if" for reasons set forth in the footnote) this Court resolves in the *Avery* case the issue of whether local legislative bodies are governed by the Equal Protection Clause, the decision will greatly affect the initial issue brought up by this appeal. Appellants therefore waited as long as they dared for a decision in that case before preparing this Jurisdictional Statement but, as the prescribed time limit for docketing this appeal and filing this Jurisdictional Statement approached its end, appellants could not delay further. Hence, as of the writing of this Jurisdictional Statement, the *Avery* case still is awaiting decision. However, as indicated in the footnote,* there are good reasons to doubt if

* For two reasons, it may be doubted whether the question raised by the *Avery* case will be resolved finally by this Court: 1. The governmental body of Midland County, Texas, may not be a legislative one but an administrative one to which the Equal Protection Clause does not apply under *Sailors* v. *Board of Education, supra*, the Supreme Court of Texas having described the Midland County body as "the commissioners court" whose primary function "is the administration of the business affairs of the county" and whose "legislative functions are negligible" (406 S.W. 2d 422, 426); 2. The Supreme Court of Texas reversed the judgments below and remanded the cause to the trial court to enter another judgment. The judgment of the Texas state court, therefore, may be determined ultimately by this Court not to be a final one under 28 U.S. Code Section 1257 in the sense that will sustain a writ of certiorari (see, e. g., *Brown* v. *Marion National Bank*, 146 U.S. 619, 13 S. Ct. 260, 36 L. Ed. 1106).

the issue of whether the Equal Protection Clause applies to an elected county legislative body will be determined by the *Avery* case. That issue may first reach this Court and be resolved through this appeal.

Appellants are not unmindful of *Bianchi* v. *Griffing, supra,* which has been before this Court before and which also attempted to attack Sections 201 and 203 of the Charter as malapportioning the governing body of Suffolk County and to present the issue of whether the Equal Protection Clause of the Fourteenth Amendment applies to that governing body. In that case, after the three judge court had resolved the issue in the affirmative, held that the Equal Protection Clause applied to the County Board of Supervisors and that Sections 201 and 203 of the Charter violated the Fourteenth Amendment, this Court vacated the judgment of the three judge court and remanded the case to the District Court for a fresh decree (387 U. S. 97, 87 S. Ct. 1544, 18 L. Ed. 2d 643). This Court, however, did not "reverse" the three judge court on the merits, as appellees argued below, or consider the constitutional issues on the merits, or hold that the three judge court was incorrect in its holding. The vacatur of the three judge court judgment was solely on jurisdictional grounds, this Court holding that the Charter attacked by complaint, not being of statewide application but only applying to Suffolk County, was not a "State statute" within the meaning of 28 U. S. Code Section 2281, that the three judge court was not authorized or properly convened and that this Court had no jurisdiction over the decision of the three judge court under 28 U. S. Code Section 1253. The instant appeal, of course, does not suffer from the same jurisdictional defects that plagued the *Bianchi* case. This appeal challenges Sections 150 and 153(4) of the County Law, a statute of statewide application, which the complaint in the *Bianchi* case did not do. This appeal, which also challenges the Charter, which is not of application statewide, comes to this Court not resting on 28 U. S. Code Section

2281 and Section 1253 but resting on 28 U. S. Code Section 1257(2) whose phrase "statute of any state", as was pointed out earlier at page 4, has been held consistently to encompass every act legislative in character, including acts which do not have application statewide but affect only local matters. The meaning of "statute of any state", the term used in 28 U. S. Code Section 1257(2) is quite different from "State statute" used in 28 U. S. Code Section 2281. The Equal Protection issue tendered by this appeal, therefore, is not only properly cognizable by this Court but is a highly important issue that still remains unresolved by this Court. Since the remand by this Court of the *Bianchi* case to the District Court, the *Bianchi* complaint has been dismissed by the District Court by a decision dated June 29, 1967 (271 F. Supp. 497), which is now (as of the writing of this Jurisdictional Statement) being appealed to the United States Court of Appeals for the Second Circuit. It is questionable whether, if appealed to this Court, it will reach this Court prior to appellants' case. Hence, assuming that the issue is not resolved by the *Avery* case for reasons outlined previously, it probably will be the burden of appellants' case to bring to this Court; for the first time on the merits, the fundamental issue of whether the Equal Protection Clause of the Fourteenth Amendment applies to local elected legislative bodies. This is the question which this Court did not have before it in the case of *Sailors* v. *Board of Education, supra,* and in which case this Court said that it would "reserve the question for other cases such as *Moody* v. *Flowers* (*Board of Supervisors* v. *Bianchi*), 386 U. S. —, 87 S. Ct. 1544 which we have disposed of on jurisdictional grounds." (387 U. S. 105, 87 S. Ct. 1549, 1551). Moreover, it should be noted that, while this appeal is, in its third cause of action, a case like the *Bianchi* case, it is also unlike the *Bianchi* case: the complaint in this case does not allege only population disparity as did the now dismissed *Bianchi* complaint, dismissed by the District Court

on the ground that population disparity alone, absent other factors, is not enough to render the County governmental system unconstitutional. In this complaint and in this appeal there was alleged, not only alleged but proved at the trial, that there were many more factors of difference between the western and eastern towns besides population differences; there were differences in taxable valuations, tax burdens and payments; differences in land uses and characteristics; differences in urbanization; differences in County Police District concerns; and it was shown that the County Board members are town representatives and that the governmental scheme of the County Board is such that it does not respond to the requirements of the five western Police District towns. Appellants' allegations and proof at the trial made out a prima facie case of invidious discrimination and required appellees to show that a rational basis existed for the disparities and the malapportionment (*Moss* v. *Burkhart*, 207 F. Supp. 885, app. dism. 374 U. S. 103). But appellees failed to make any showing whatever.

This Court's early resolution of the Equal Protection issue is necessary. It is needed to clear away all doubts regarding the validity of Sections 201 and 203 of the Charter. As indicated above at page 21, the Appellate Division, in this case (R. 270), appeared to indicate that Section 203 was invalid, but this was based on the June 15, 1966, ruling and direction of the *Bianchi* three judge statutory court ruling it invalid—whose judgment this Court later vacated. In their brief to the Court of Appeals, appellees reiterated contentions made by them in the Appellate Division and trial, that Sections 201 and 203 of the Charter were not violative of the Equal Protection Clause of the Fourteenth Amendment and that the constitutional standards required by the Fourteenth Amendment of state legislatures do not apply to sub-state legislative bodies. In the Court of Appeals, appellees also maintained that the *Bianchi* case, on which appellants

had relied in the Appellate Division and to which the Appellate Division referred in its opinion, had been overruled not only because "the Supreme Court reversed the lower court" (to quote from page 13 of appellee's brief to the Court of Appeals) when this Court vacated the decree of the three judge court, but also when the District Court, by Hon. Walter R. Bruchhausen, J. (271 F. Supp. 497), after remand by this Court, dismissed the *Bianchi* case on June 29, 1967, for failure to state a cause of action and thereby brought about a "reversal of his original opinion" (to quote again from appellees' brief to the Court of Appeals, p. 7). Appellees concluded that not only was Section 201 constitutional, and the entire Charter constitutional, but that Section 203 was constitutional, made so by the Supreme Court and District Court "reversals" rendered after the Appellate Division's opinion. The Court of Appeals expressed no opinion, but, by its judgment adverse to appellants, evidently took the view that this Court did "reverse" the three judge statutory court, evidently accepted appellees' contentions and conclusions and, by necessity, rejected appellants' contentions and conclusions to the contrary and upheld the validity and constitutionality of Sections 201 and 203 and the rest of the Charter. By taking jurisdiction of this appeal and reversing the Court of Appeals, this Court can make plain what it did when it vacated the judgment of the *Bianchi* three judge court and can correct the erroneous views and judgment of the Court of Appeals as to the constitutionality of the Charter. Moreover, there are now over one million persons residing in Suffolk County with the major increase in population, as might be expected, taking place in the five western towns which are nearest to the City of New York and the first to receive its suburban-bound residents. The disparity of representation on the County Board of Supervisors has worsened since this action was commenced over four years ago and the disparity has deepened and the discrimination

against appellants and other voters in the five western towns has continued, as appellants charged originally in their complaint (R. 27-28, App. B, B-22). Only by considering this appeal and by an adjudication reversing the Court of Appeals can this Court eliminate the inequality of representation now being endured by over ninety per cent of the population of the County.

Question 1 also tenders to this Court a second issue of a significance at least as weighty as the issue relating to the applicability of the Equal Protection Clause to local elected legislative bodies: whether a Charter, intended to form and forming a single scheme of local government centered on an elected body, which contains constitutionally objectionable provisions essential to the existence and operation of the governmental scheme which create, constitute and empower the elected body, is null, void and unconstitutional in its entirety. This issue has never presented to this Court by the *Bianchi* case, nor by any of the legislative apportionment cases which this Court has adjudicated so far, nor will it be brought up or be resolved by the *Avery* case even if this Court decides that it has jurisdiction of the case and that the Equal Protection Clause applies to the Texas county body. If this Court determines in *Avery* that local elected governments, constituted and granted powers by local charters, are subject to the same constitutional standards now demanded of state legislatures under the Equal Protection Clause so that the provisions of their Charters, relating to their creation, composition, proceedings and powers are unconstitutional, then the very serious constiutional problem now presented by this appeal will recur repeatedly as to whether the partial invalidity of their charters renders their charters wholly invalid. It is a problem to face every malapportioned local governing body with a charter in each state, county, city and town and is a problem most serious and important to all citizens of the United States within the jurisdiction of the malapportioned body.

This Court's consideration and determination of the problem will resolve it and provide needed guidance for all United States citizens and their local governing bodies.

As to Questions 2, 3 and 4:

These Questions 2, 3 and 4 are of pressing importance not only for the appellant Incorporated Vilage of Port Jefferson and the individual appellants who are electors in it but for all villages to be incorporated in the future in the five western towns in Suffolk County and their electors, on whose behalf this action was brought also (R. 6, App. B, B-1). The decision of the Court of Appeals in affirming the Appellate Division and thereby sustaining the validity of Article XII of the Charter and applying it to supersede and modify the Village Law and charter of villages incorporated and to be incorporated subsequent to 1960 is not correct yet may have far reaching effects which may touch and undermine local governments in and out of the State of New York. Within New York, it gives subsequently incorporated villages in Suffolk County and their electors lesser voting rights than, and a charter different from, other villages incorporated in Suffolk County prior to 1960 and lesser police powers and functions than villages in other counties of the State of New York—all in contravention of the Equal Protection Clause of the Fourteenth Amendment. This decision, if erroneously followed in other states, will reduce the rights of local electors and the charters and functions of other villages or local governments similarly incorporated subsequent to the creation of a municipal district, will destroy their equality vis-a-vis earlier incorporated local governments and will destroy the autonomy of the villages and their jurisdiction within their own territory to provide police or other services. We do not understand that the Questions 2, 3 and 4 raised by this case have ever been resolved by prior decisions of this Court, but we believe that they ought to be because

of their constitutional significance and serious practical consequences for all municipal governments in each state and locality and the citizens of the United States who live under their jurisdictions.

CONCLUSION

For the reasons stated, the federal constitutional questions brought up by this appeal are substantial and of pressing importance to the public. Probable jurisdiction should be noted in this case so that the questions presented may be resolved after plenary consideration of the case on the merits.

Respectfully submitted,

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APPENDIX A

Constitutional and Statutory Provisions Involved

Constitution of the United States

ARTICLE THE FOURTEENTH

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

County Law of the State of New York

SECTION 150. The supervisors of the several cities and towns in each county, when lawfully convened, shall constitute the board of supervisors of the county.

SECTION 153(4). Whenever in this chapter or other general, special or local law, the board of supervisors is authorized or required to act, and no proportion of the voting strength for such action is otherwise prescribed, such action shall be taken by the affirmative vote of a majority of the total membership of the board. A roll call shall be taken and entered by the clerk in the minutes of its proceedings when required by law or upon request of any member of the board.

Suffolk County Charter (Chapter 278, Laws 1958)

SECTION 201. The board of supervisors; general powers.

The supervisors of the several towns of the county, when lawfully convened, shall constitute the board of supervisors of the county. It shall be the legislative and policy determining body of the county and shall, except as otherwise expressly provided in this charter, have and exercise all the powers and duties of the county together with all the powers and duties which now are, or may hereafter be, conferred or imposed on boards of supervisors by all laws applicable to the county not inconsistent with this charter. The board of supervisors shall also have such other powers and duties as are provided by this charter.

SECTION 203. Voting; quorum.

Each supervisor shall have one vote. A majority of the whole number of the members of the board shall constitute a quorum. Except as otherwise provided by law, local laws and resolutions shall be adopted by a vote of not less than a majority of the total membership of the board. In case of a tie vote on any matter at any meeting of the board of supervisors the county executive shall have a casting vote provided, however, that he shall not have a vote as to any local law or resolution which provides a new form of government for the county or changes the voting strength of the supervisors or which changes the location of the county seat.

SECTION 1206. Vote on creation of county police district.

1. At the general election at which a vote is taken on the adoption of this charter there shall also be submitted to all the electors of all the towns of Suffolk county, including the electors within incorporated villages, the following question, "Shall the town of authorize the transfer of its police functions to the county police department of Suffolk county and shall said town become a part of the Suffolk county police district?"

2. At said general election at which the vote is taken on the adoption of this charter there shall also be submitted to all the electors of each incorporated village in said county the following separate question, "Shall the village of authorize the transfer of its police functions to the county police department of Suffolk county and said village become a part of the Suffolk county police district?"

SECTION 1207. County police district; how established.

1. If three or more contiguous towns, by a majority vote cast in each such town, elect to transfer their police functions to the county and to become part of the county police district, a county police district shall thereupon be created effective on the first day of January of the second year following such election and such district shall thereupon become part of and be under the jurisdiction of the county police department. The county police district so created shall consist of the unincorporated territory of the three or more contiguous towns so electing to become part of the county police district and also the territory of any incorporated village situated within any of said contiguous towns which has by a majority vote cast in such village, elected to transfer its police functions to the county and to become part of the county police district. The election of any such town or village shall be irrevocable.

2. The town of Shelter Island shall be deemed to be contiguous to the towns of Southold, Southampton and East Hampton.

3. Once a county police district has been created, any town, village or special police district contiguous to such county police district may thereafter elect to become part of the county police district and upon making such election by the majority vote of the electors of such town, special police district or village, the area comprising such town, special police district or village shall become irrevocably a part of the county police district on the first day of January of the second year following such election.

SECTION 1210. Expenses of the police department; how raised.

a. The board of supervisors shall annually cause to be raised the amount of money required to pay the annual expenses of the police department by levying and collecting a uniform tax upon the real estate subject to taxation located within the county police district, based upon the equalized assessed valuation of such real estate.

Village Law of the State of New York

SECTION 34. If the territory so incorporated as a village includes within its boundaries part of a special district established by the town for a sewer, water, light, fire, park, health, police or any other special district for municipal purposes the territory so included within the boundaries of the village shall not be relieved from bearing its proportionate share of any liability or indebtedness incurred for such special district purposes while such territory was a part of such special district and until such liability is discharged, or such indebtedness paid the proportionate share to which such territory would be liable if it had not been included in the boundaries of the village shall be levied upon, assessed and collected from such territory by the proper officers of such village in the same manner as if such territory had not been included within the boundaries of the village. All moneys so collected shall be paid over from time to time by the village treasurer to the supervisor of the town to discharge such liability. The collector or receiver of taxes of a town and the treasurer of a county shall continue in the execution of his duties in respect to the property included in the boundaries of a village incorporated under the provisions of this act until he shall have collected the taxes authorized or assessed for the year of such incorporation or which have been extended on the town assessment roll and become a lien after such incorpo-

ration and pay to the treasurer of the village when collected the taxes extended on the assessment roll against property within the village for highway, health, water, fire, park, sewer, police or other special district purposes.

SECTION 188a. The board of trustees or municipal board acting as police commissioners of any village of the first, second and third class within a county of more than three hundred thousand population adjoining a city of the first class, except a village within the county of Westchester, or wholly within a county containing a city of more than five hundred thousand population and less than one million population and in the county of Rockland shall, and of any other village may, instead of appointing policemen for fixed terms pursuant to section one hundred and eighty-eight of this chapter, by resolution, establish a police department in such village and appoint a chief of police, and such captains of police, lieutenants of police, sergeants of police, and patrolmen as may be needed, and fix their compensation. Such board of trustees or municipal board, after the establishment of such police department, shall have power and authority to contract with any other village or villages, other than a village of the first class, for the supplying of police protection therein. Such contract or contracts may be for a term of years not exceeding five years at any one time and shall further provide the terms and conditions mutually determined and agreed upon between the contracting parties with respect to such police service. No person shall be appointed a member of any such police force except as provided in section one hundred and eighty-eight-b of this chapter. The board of trustees of a village may submit to the qualified voters of the village at a general or special election a proposition to abolish a police department established pursuant to this section and upon the adoption thereof by a majority of the qualified voters of the village voting upon the proposition, the department shall be deemed abolished.

APPENDIX B

Complaint

SUPREME COURT

SUFFOLK COUNTY

INCORPORATED VILLAGE OF PORT JEFFERSON, ROBERT L. ROBERTSON and ROBERT E. LINK, on behalf of themselves and all others similarly situated owners, taxpayers, voters, residents, electors and citizens, in the Incorporated Village of Port Jefferson, in the Towns of Brookhaven, Smithtown, Huntington, Islip and Babylon, and in every Village to be incorporated in said Towns hereafter,

Plaintiffs,

against

THE BOARD OF SUPERVISORS OF THE COUNTY OF SUFFOLK, THE COUNTY TREASURER OF THE COUNTY OF SUFFOLK, and the RECEIVER OF TAXES OF THE TOWN OF BROOKHAVEN,

Defendants.

Plaintiffs, complaining of the defendants, by Arthur S. Berger, their attorney, respectfully allege on behalf of themselves and on behalf of all others similarly situated:

FIRST CAUSE OF ACTION:

1. The questions which are the subject of this action are of common and general interest to the owners, taxpayers, residents, voters, electors and citizens in the Incorporated Village of Port Jefferson, in the Towns of Brookhaven, Smithtown, Huntington, Islip and Babylon,

and to those who will be in every Village to be incorporated in said Towns.

2. That the plaintiff Incorporated Village of Port Jefferson (hereinafter referred to as Village) is a domestic municipal corporation situated within the Town of Brookhaven, Suffolk County, New York, having been duly incorporated on April 10, 1963, under the Village Law of the State of New York, and said plaintiff is entitled to all the powers, privileges and rights conferred upon villages organized thereunder.

3. a. That plaintiff Robert L. Robertson was and now is the Mayor of the Village, duly elected, qualified and acting as such, is a resident, elector and taxpayer in said Village, a citizen of the State of New York and of the United States, and is a qualified voter entitled to vote for all propositions submitted to the voters of Suffolk County and to vote for supervisor of the Town of Brookhaven; and is the owner of a certain piece or parcel of land situate, lying and being in the Village, subject to taxation, more particularly bounded and described as follows:

North by Williams Street
East by High Street
South by Schultz
West by Wick

and

b. That the plaintiff Robert E. Link is a resident, elector and taxpayer in said Village, a citizen of the State of New York and of the United States, is a voter qualified and entitled to vote for all propositions submitted to the voters of Suffolk County and to vote for supervisor of the Town of Brookhaven; and is an owner of a certain piece or parcel of land situate, lying and being in the Village, subject to taxation, and more particularly bounded and described as follows:

Suassa Park
822 Sec 1
157 to 164
East 5 ft. of 165

4. That on or about March 20, 1958, there was enacted into law by the legislature of this state Chapter 278 of the Laws of 1958, known as the Suffolk County Charter (and referred to hereinafter as the Charter) which Charter contained an Article XII and certain sections therein relating to a Department of Police, including Sections 1206, 1207 and 1210(a) each of which provides as follows:

" 1206. Vote on creation of county police district.

1. At the general election at which a vote is taken on the adoption of this charter there shall also be submitted to all the electors of all of the towns of Suffolk county, including the electors within incorporated villages, the following question, 'Shall the town of authorize the transfer of its police functions to the county police department of Suffolk county and shall said town became a part of the Suffolk county police district?'

2. At said general election at which the vote is taken on the adoption of this charter there shall also be submitted to all the electors of each incorporated village in said county the following separate question, 'Shall the village of authorize the transfer of its police functions to the county police department of Suffolk county and said village become part of the Suffok county police district?'

" 1207. County police district; how established.

1. If three or more contiguous towns, by a majority vote cast in each such town, elect to transfer their police functions to the county and to become part of the county police district, a county police district shall thereupon be created effective on the first day of January of

the second year following such election and such district shall thereupon become part of and be under the jurisdiction of the county police department. The county police district so created shall consist of the unincorporated territory of the three or more contiguous town so electing to become part of the county police district and also the territory of any incorporated village situated within any of said contiguous towns which has by a majority vote cast in such village, elected to transfer its police functions to the county and to become part of the county police district. The election of any such town or village shall be irrevocable.

2. The town of Shelter Island shall be deemed to be contiguous to the towns of Southold, Southampton and East Hampton.

3. Once a county police district has been created, any town, village or special police district contiguous to such county police district may thereafter elect to become part of the county police district and upon making such election by the majority vote of the electors of such town, special police district or village, the area comprising such town, special police district or village shall become irrevocably a part of the county police district on the first day of January of the second year following such election."

" 1210. Expenses of the police department; how raised.

a. The board of supervisors shall annually cause to be raised the amount of money required to pay the annual expenses of the police department by levying and collecting a uniform tax upon the real estate subject to taxation located within the county police district, based upon the equalized assessed valuation of such real estate."

5. That in and by said Sections 1206 and 1207 of the Charter provisions were enacted for the creation of a

County Police District to consist a) of the unincorporated territory of contiguous towns electing to become part of the County Police District; and to consist b) of the territory of any incorporated village in or touching any of said towns if, by majority vote cast in the incorporated village, the electors of the village elected to become part of the County Police District and authorized the transfer of the police functions of the village to the County Police Department; that said provisions of Sections 1206 and 1207 were enacted to afford to the electors of any incorporated village within or contiguous to said County Police District either in being at the time of the creation of the County Police District or incorporated subsequently, the opportunity and right to elect whether to become part of said County Police District and whether to transfer the police functions of said incorporated village to the County Police Department; and in and by Section 1210(a) of the Charter provision was made for raising the moneys required to pay the annual expenses of the County Police Department by annually levying and collecting a tax on real property subject to taxation within the County Police District.

6. That an opportunity was afforded the electors of each incorporated village in Suffolk County, including the incorporated Villages of Northport, Asharoken, Huntington Bay and Lloyd's Harbor, situated in the Town of Huntington, and the Incorporated Village of Amityville, situated in the Town of Babylon, and the Incorporated Village of Head of the Harbor, situated in the Town of Smithtown, to elect whether to become part of the County Police District and whether to transfer the police functions of such village to the County Police Department, and a separate question to this effect was submitted to all the electors of each incorporated village; and that said County Police District was created effective January 1, 1960, to consist of the unincorporated territory of the five western

towns in Suffolk County, to wit, Babylon, Islip, Smithtown, Huntington and Brookhaven, after a majority vote in 1958 was cast in each of said towns, to transfer their police functions to the County and to become part of the police district; and said county Police District further consisted of the territory of the incorporated villages of Patchogue, Bellport, Shoreham, Old Field, Poquott, Belle Terre, Babylon, Lindenhurst and Brightwaters situated in said towns after a majority vote was cast in each of such villages to transfer its police functions to the county and to become part of the County Police District; and that the operation and effect of said Sections 1207 and 1210(a) of the Charter for the creation of a County Police District and providing for a tax for annual police department expenses was confined only to half the County of Suffolk and to its five western contiguous towns and the villages incorporated therein electing to become part of said County Police District and to transfer their police functions thereto.

7. That included in the County Police District was a part of the unincorporated territory of the Town of Brookhaven that later became incorporated as the Incorporated Village of Port Jefferson.

8. That, on information and belief, said County Police District did not and does not include the territory of the incorporated villages of Northport, Asharoken, Huntington Bay and Lloyd's Harbor situated in the Town of Huntington, and the Incorporated Village of Amityville, situated in the Town of Babylon, and the Incorporated Village of Head of the Harbor, situated in the Town of Smithtown, whose respective electors, by separate questions submitted to them as electors of said incorporated villages, were given the opportunity to elect whether to transfer the police functions of said villages, respectively, to the County Police Department and whether to become part of the County Police District, and whose electors by

majority vote elected not to authorize such transfer and not to become part of the County Police District; and, on information and belief, the real property within said villages is not subject to taxation and is not taxed for annual police department expenses under Section 1210(a) of the Charter.

9. That the aforesaid Charter and particularly Article XII and Sections 1206, 1207 and 1210(a) thereof were enacted by the legislature of this state to confer on the electors of every village incorporated under the Village Law in Suffolk County in, or in contact with, towns comprising the County Police District, regardless of the date of incorporation of such village, the right and opportunity to elect at least once whether to become part of the County Police District and to transfer the police functions of said village to the County Police Department; that the transfer of said functions was precluded by the Constitution of the State of New York unless the transfer received the majority of votes cast in each village as one unit; and the legislature intended to exclude from the Suffolk County Police District the incorporated territory of any village, in being when the County Police District was created or incorporated under the Village Law subsequent to the creation of the County Police District, whose electors, once given the right and opportunity to elect, by majority vote elected not to become part of the County Police District and not to transfer its police functions to the County Police Department; and that the legislature never intended Section 1210(a) of the Charter to be effective or to apply to the real property of any such village which has elected by majority vote cast in such village not to become part of the County Police District, and never intended the real property of such village to be subject to taxation or to be taxed for annual police department expenses under said Section 1210(a).

10. That the Charter, and all the sections thereof, was adopted by the electors of the County of Suffolk in the year 1958 and became effective thereafter and is still in force and effect.

11. That on or about April 10, 1963, a part of the unincorporated territory of the Town of Brookhaven became incorporated under the Village Law as the Incorporated Village of Port Jefferson.

12. That Section 34 of the Village Law of the State of New York provides as follows:

"If the territory so incorporated as a village includes within its boundaries part of a special district established by the town for a sewer, water, light, fire, park, health, police or any other special district for municipal purposes the territory so included within the boundaries of the village shall not be relieved from bearing its proportionate share of any liability or indebtedness incurred for such special district purposes while such territory was a part of such special district and until such liability is discharged, or such indebtedness paid the proportionate share to which such territory would be liable if it had not been included in the boundaries of the village shall be levied upon, assessed and collected from such territory by the proper officers of such village in the same manner as if such territory had not been included within the boundaries of the village. All moneys so collected shall be paid over from time to time by the village treasurer to the supervisor of the town to discharge such liability. The collector or receiver of taxes of a town and the treasurer of a county shall continue in the execution of his duties in respect to the property included in the boundaries of a village incorporated under the provisions of this act until he shall have collected the taxes authorized or assessed for the year of such incorporation or which have been extended on the town assessment

roll and become a lien after such incorporation and pay to the treasurer of the village when collected the taxes extended on the assessment roll against property within the village for highway, health, water, fire, park, sewer, police or other special district purposes."

13. That in and by said Section the legislature provided and intended that upon incorporation as a village the territory should cease to be included as part of the special district; and said Section 34 became effective prior to the enactment and adoption of the Charter, was in force and effect at the time of the incorporation of the Village, and still is in full force and effect.

14. That the County Police District consisted in part of such part of the unincorporated territory of the Town of Brookhaven until said territory became incorporated on April 10, 1963, at which date as an incorporated village it was no longer included in and comprised in said County Police District and would be included therein only if, after an opportunity to elect and after a majority vote cast in said village, the electors of said village elected to become part of the County Police District and authorized the transfer of its police functions to the County Police Department.

15. That on and after April 10, 1963, and until the electors of the Village, by majority vote cast therein, so elect to become part of the County Police District, the real property within the Village, including that of plaintiffs Robert L. Robertson and Robert E. Link, and of all owners and taxpayers similarly situated within the Village, was not and is not included within the County Police District and was not and is not subject to taxation for annual police department expenses under Section 1210(a) of the Charter, and Section 1210(a) is not effective or applicable as to said real property.

16. That, after public hearings, a Special Election was duly held in the Village on October 17, 1963, and by a majority vote of the qualified electors, it was voted and elected that the Village shall remain separate from the County Police District and shall retain and exercise its police functions and not transfer them to the County Police Department; that the electors of the Village never voted since the date of incorporation on April 10, 1963, to become part of the County Police District or to transfer the police functions of the Village.

17. That Section 188a of the Village Law of the State of New York provides as follows:

"The board of trustees or municipal board acting as police commissioners of any village of the first, second and third class within a county of more than three hundred thousand population adjoining a city of the first class, except a village within the county of Westchester, or wholly within a county containing a city of more than five hundred thousand population and less than one million population and in the county of Rockland shall, and of any other village may, instead of appointing policemen for fixed terms pursuant to section one hundred and eighty-eight of this chapter, by resolution, establish a police department in such village and appoint a chief of police, and such captains of police, lieutenants of police, sergeants of police, and patrolmen as may be needed, and fix their compensation. Such board of trustees or municipal board, after the establishment of such police department, shall have power and authority to contract with any other village or villages, other than a village of the first class, for the supplying of police protection therein. Such contract or contracts may be for a term of years not exceeding five years at any one time and shall further provide the terms and conditions mutually determined and agreed upon between the contracting parties with respect to such police service. No person shall be appointed a member of any

such police force except as provided in section one hundred and eighty-eight-b of this chapter. The board of trustees of a village may submit to the qualified voters of the village at a general or special election a proposition to abolish a police department established pursuant to this section and upon the adoption thereof by a majority of the qualified voters of the village voting upon the proposition, the department shall be deemed abolished."

18. That the foregoing provision became effective prior to the enactment and adoption of the Charter, was in force and effect at the time of the incorporation of the Village and still is in full force and effect.

19. That on October 24, 1963, the Board of Trustees of the Village duly adopted a resolution pursuant to Section 188a of the Village Law which established a police department in and for the Village the members of which would exercise the rights and duties of peace officers and law enforcement officers, and authorized the employment of personnel for that purpose and the purchase of building, equipment, uniforms and motor vehicles therefor; that said police department has not been abolished; that, among other things, said resolution further resolved that the Village was not and never was part of the County Police District and is independent and separate therefrom and that the real property within the Village was not subject to taxation for annual police department expenses under Section 1210(a) of the Charter.

20. That prior to the commencement of this action and on or about October 25, 1963, a copy of said resolution was duly sent to each and all of the defendants herein, and a copy of said resolution is annexed hereto and marked Exhibit "A".

21. That thereafter and on or about October 28, 1963, plaintiff Robert L. Robertson, as Mayor of the Village,

appeared before the defendant Board of Supervisors and apprised them of the position and action of the Board of Trustees of the Village, and at said meeting the Board of Supervisors refused to concede or acquiesce in the position and action of the said Board of Trustees and asserted its intention to oppose the Village; that personnel of the County Police Department now usurp the police functions of the Village and assert jurisdiction within the Village.

22. That the defendant Board of Supervisors, designated and described by its official title, comprise the supervisors of the ten towns of Suffolk County, and the legislative and police determining body of the County, having the general powers conferred upon them by Sections 201 and 202 of the Charter, including the power and duty to make appropriations and levy taxes, and more particularly under and pursuant to Section 1210(a) of Chapter 278 of the Laws of New York 1958, known as The Suffolk County Charter (herein referred to as the Charter) having the power and duty annually to cause to be raised the amount of money required to pay the annual expenses of the Suffolk County Police Department by levying and collecting a uniform tax upon the real property subject to taxation within the Suffolk County Police District based upon the equalized assessed valuation of such real property.

23. That the defendant County Treasurer has, among other powers and duties, the duty to collect all taxes of the County, including the tax to pay the annual expenses of the Suffolk County Police Department, and to receive and have custody of all public funds belonging to the County.

24. That the defendant Receiver of Taxes of the Town of Brookhaven has, among other powers and duties, the

power to collect all taxes of the County of Suffolk in the said Town including said tax.

25. That the rate of taxation as levied, collected, fixed and extended on the assessment rolls of the Town of Brookhaven for the annual expenses of the Suffolk County Police Department in 1962/1963 was $1.49 for each and every one hundred dollars of assessed valuation.

26. That the total equalized assessed valuation of the real property within the Incorporated Village of Port Jefferson for 1962/1963 as shown upon the assessment rolls of the Town of Brookhaven for 1962/1963, and upon the basis of which the tax levy for 1962/1963 was made under Section 1210(a) of the Charter and collected by defendants for the annual expenses of the Suffolk County Police Department, was the sum of $15,906,235, and that total taxes for said Police Department expenses were levied and collected by defendants against said real property in the sum of $237,002.90; that the equalized assessed valuation of the real property of plaintiff Robert L. Robertson for 1962/1963 as shown on said assessment rolls, and upon the basis of which said tax levy was made, is the sum of $1700.00; and that taxes for said Police Department expenses were levied and collected by defendants against said real property in the sum of $25.36; that the equalized assessed valuation of the real property of plaintiff Robert E. Link for 1962/1963 as shown on said assessment rolls and upon the basis of which said tax lexy was made is the sum of $3,300.00; and that taxes for said Police Department expenses were levied and collected against said real property in the sum of $49.17.

27. That, on information and belief, the assessed valuations shown by the assessment rolls for the Town of Brookhaven in 1962/1963 for the territories comprising the

incorporated villages in the Town of Brookhaven were as follows:

Port Jefferson	$15,906,235
Patchogue	10,202,411
Bellport	2,848,752
Old Field	1,577,278
Belle Terre	972,029
Poquott	548,605
Shoreham	505,243

28. That all said villages were afforded the right and opportunity to elect whether to become part of the County Police District and to transfer police functions except the Village which in 1962/1963 paid $237,002.90 in taxes to pay County Police Department expenses.

29. That in another and separate proceeding under Article 78 in this Court the Village Treasurer of the Village is asserting a cause of action separate from those alleged in this action to require the defendant County Treasurer to perform the duty enjoined upon him by the Village Law to pay to the Village Treasurer the proportion of taxes levied and collected against said real property since April 10, 1963, and to recover on said collected moneys; that demand pursuant to Section 34 of the Village Law was made on November 4, 1963, upon the County Treasurer for payment of said moneys and said demand was refused on the ground that the Village was and is a part of the County Police District; that, on information and belief, defendants wrongfully and unlawfully intend to levy and collect taxes, are levying and collecting taxes, and will continue in 1963/1964 and in every future year to levy and collect taxes, in sums approximating and exceeding $237,000 each year, to pay the annual expenses of the Suffolk County Police Department upon the real property within the Village, including the real property of plaintiffs Robert L. Robertson and Robert E. Link, and of all owners and taxpayers simi-

larly situated, unless enjoined and restrained therefrom by a judgment of this Court.

30. That plaintiffs have no adequate remedy at law and a continuation of the wrongful acts of defendants in levying and collecting taxes to pay the annual expenses of the Suffolk County Police Department against the said real properties within the Village, including those of plaintiffs Robert L. Robertson and Robert E. Link and of all owners and taxpayers similarly situated within the Village will cause irreparable harm to plaintiffs and all others similarly situated and lead to a multiplicity of actions or special proceedings.

31. That a declaration of the rights of the plaintiffs and others similarly situated and their relationship to the County Police District is essential to the safety and welfare of the plaintiffs and of all electors of the Village similarly situated, to the autonomy of the Village, to the proper and lawful exercise of their rights and duties by the personnel of the police department in and for the Village, and to the avoidance of irreparable injury and multiplicity of actions due to the wrongful levying and collecting of taxes to pay annual police department expenses against real property within the Village.

FOR A SECOND, SEPARATE AND DISTINCT CAUSE OF ACTION:

32. That all statements and allegations made in the prior cause of action should be deemed repeated herein.

33. That if it is declared and held under the Charter and Sections 1206, 1207 and 1210(a) that the Village is included within and is part of the County Police District or that its police functions are transferred to the County Police Department or that the real property within the Village, including that of plaintiffs Robert L. Robertson

and Robert E. Link and of all others similarly situated, is subject to taxation to pay the annual expenses of the County Police Department pursuant to Section 1210(a) of the Charter or that the Board of Trustees of the Village were and are not empowered to establish a police department in and for the Village whose members shall exercise the rights and duties of peace officers and law enforcement officers generally, the Charter and Sections 1207 and 1210(a) thereof thus declared, held and applied would violate the New York State Constitution and the Constitution of the United States in that as thus held and applied they would constitute a local bill "incorporating villages" in violation of Article 3, Section 17, of the New York State Constitution which bill was not recommended by commissioners or any public agency as provided in Section 21, Article 3, of said Constitution; in that thus held and applied they would constitute a transfer of police functions of the Village in violation of Article 9, Section 2(c) of the New York State Constitution; in that thus held and applied they would constitute a denial of equal protection of the laws in violation of Article 1, Section 11, of the New York State Constitution and the fourteenth Amendment to the Constitution of the United States; in that thus held and applied they would deprive the Village of self-government and home-rule in violation of Article 9, Section 8, of the New York State Constitution; in that thus held they would constitute a deprivation of the liberty and property of the plaintiffs without due process of law in violation of Article 1, Section 6, of the New York State Constitution and of the Fourteenth Amendment to the Constitution of the United States; in that thus held they would constitute a disfranchising of plaintiffs and others similarly situated as citizens of the State of New York in violation of Article 1, Section 1, of the New York State Constitution.

For a Third Cause of Action Against the Board of Supervisors

34. That all statements and allegations made in the paragraphs numbered 1; 2; 3 a and b, 4, 5, 6, 7, 10, 11, 22 and 26 set forth in the First Cause of Action shall be deemed repeated herein.

35. That Sections 201 and 203 of said Charter provide as follows:

Section 201 "The supervisors of the several towns of the county, when lawfully convened, shall constitute the board of supervisors of the county. It shall be the legislative and policy determining body of the county and shall, except as otherwise expressly provided in this charter, have and exercise all the powers and duties of the county together with all the powers and duties which now are, or may hereafter be, conferred or imposed on boards of supervisors by all laws applicable to the county not inconsistent with this charter. The board of supervisors shall also have such other powers and duties as are provided by this charter."

Section 203 "Each supervisor shall have one vote. A majority of the whole number of the members of the board shall constitute a quorum. Except as otherwise provided by law, local laws and resolutions shall be adopted by a vote of no less than a majority of the total membership of the board. In case of a tie vote on any matter at any meeting of the board of supervisors the county executive shall have a casting vote, provided, however, that he shall not have a vote as to any local law or resolution which provides a new form of government, for the county or changes the voting strength of the supervisors or which changes the location of the county seat."

36. That the County Law of the State of New York provides as follows:

Section 150. "The supervisors of the several cities and towns in each county, when lawfully convened, shall constitute the board of supervisors of the county."

Section 153. 4. "Whenever in this chapter or other general, special or local law, the board of supervisors is authorized or required to act, and no proportion of the voting strength for such action is otherwise prescribed, such action shall be taken by the affirmative vote of a majority of the total membership of the board. A roll call shall be taken and entered by the clerk in the minutes of its proceedings when required by law or upon request of any member of the board."

37. That said Sections of the County Law were in full force and effect prior to the enactment and adoption of the Charter and remain in full force and effect.

38. That general and specific powers are conferred on the Board of Supervisors by Sections 201 and 203, including the power to legislate, make local laws, create or abolish departments, provide for the enforcement of local laws, make appropriations and levy taxes; that the Board of Supervisors is and was intended to be the government of Suffolk County; that the voting and other powers conferred on them by Sections 201 and 203 and said Sections are interwoven with and are essential to the entire scheme of the Charter, that, among other things, they appoint the Commissioner of police (Section 1202(a)); they raise by taxes levied and collected on real property within the County Police District the annual expenses of the police department (Section 1210(a) and (b)); they purchase the property of the police department (Section 1214); their approval is required for the appointment of members of the Civil Service Commission (Section 601); the Department of Purchase (Section 701); the Department of Public

Works (Section 801); the Department of Health (Section 901); the Department of Civil Defense (Section 1101); the Department of Planning (Section 1301); the County Attorney (Section 1501) and the Medical Examiner (Section 1901) are appointed with their approval.

39. That the population of the ten towns of Suffolk County in 1960 divided into those within and those without the County Police District were as follows:

Within the Suffolk County Police District

Islip	172,959
Babylon	142,309
Huntington	126,221
Brookhaven	109,900
Smithtown	50,347

Outside the Suffolk County Police District

Southampton	26,861
Riverhead	14,519
Southold	13,295
East Hampton	8,827
Shelter Island	1,312

40. That the towns of Islip, Babylon, Huntington, Brookhaven and Smithtown comprise the County Police District, comprise 90% of the population of the County and are urban and heavily populated while the towns of Southampton, Riverhead, Southold, East Hampton and Shelter Island are not included in the County Police District, comprise 10% of the population of the County and are agricultural and sparsely populated.

41. That each of the ten supervisors comprising the Board of Supervisors, as the legislative and police determining body of the County having the power and duty, among other things, to levy taxes to pay the annual expenses of the County Police Department, represents the

Town in which he resides and which elected him, and not the population or the electors in the County of Suffolk; that the representation on the Board of Supervisors is based on geographical divisions of one vote per town and not on the number of the voting population in the County; that each town supervisor has the power to cast one vote regardless of the number of persons residing in his town and regardless of whether his town is within or outside the County Police District; that each town regardless of population has equal representation and has one vote on the Board of Supervisors, whether included in or excluded from the County Police District.

42. That by virtue of the provisions of Sections 150 and 153(4) of the County Law and of Sections 201, 203, 1206, 1207 and 1210(a) of the Charter there were created the County Police District and the geographic and voting structure of the Board of Supervisors.

43. That in consequence of the geographic and voting structure of the Board of Supervisors and of the creation of the County Police District in only the five towns of Islip, Babylon, Huntington, Brookhaven and Smithtown, the representation on the Board of Supervisors does not fairly represent the numbers or interests of the citizens of the County, is grossly and unjustifiably disproportionate to the distribution of voting population in the County Police District, in particular, and in Suffolk County, generally, and arbitrarily the votes of plaintiffs, and others similarly situated, in the said five towns comprising the County Police District have been impaired and debased thereby, while the votes of voters in the five towns outside the County Police District have been weighted more heavily, to wit: one vote in Shelter Island is worth 84 votes in Brookhaven; and in consequence of the geographic and voting structure of the Board of Supervisors and of the creation of a County Police District limited

to said five towns, the voting strength of the five towns outside the County Police District which represents 10% of the population of the County is enlarged, on the basis only of an invidiously geographic classification, to the point where 10% of the population outside the County Police District has the power to control one-half the representation on the Board of Supervisors, to block legislation, to frustrate and be unresponsive to the desires and demands of plaintiffs and others similarly situated for legislative remedial action and relief to revote the question of whether to become part of the County Police District or transfer their police functions if indeed they are part thereof and have transferred their functions, to impede or exaggerate appropriations and taxes to pay the expenses of the County Police Department and make appropriations or apply funds of the County or to enact laws and levy and collect taxes for County Police Department and other expenses and purposes, burdensome to, invasive of, or opposed by, plaintiffs and others similarly situated within the towns in the County Police District representing 90% of the population of the County; all of which deprives plaintiffs, and all others similarly situated, of liberty and property without due process of law in violation of Article 1, Section 6, of the New York State Constitution and the Fourteenth Amendment to the United States Constitution, and all of which contravenes the equal protection clauses as set forth in Article 1, Section 11, of the New York State Constitution and the Fourteenth Amendment to the Constitution of the United States in that plaintiffs and all others similarly situated have been denied equal protection of the laws.

44. That said geographic and voting structure of the Board of Supervisors and the creation of the County Police District in only five towns of Islip, Babylon, Huntington, Brookhaven and Smithtown has resulted in representation by towns and not by citizens and disfavors

plaintiffs and others similarly situated in said towns and impairs their effective voting rights in that they are placed in a position of constitutionally unjustifiable inequality as regards voters in irrationally favored towns outside the County Police District, and that, as population shifts and changes continue to increase the populations of, and urbanize and industrialize, the five towns within the County Police District beyond current levels while the population and character of the five towns outside the County Police District is substantially unaffected, the disparity and inequality will deepen; that the discrimination against plaintiffs and all others similarly situated will continue; all in contravention of due process and equal protection clauses of the New York State Constitution and the Fourteenth Amendment to the United States Constitution.

45. That taxes are being levied and collected against the property of plaintiffs and all others similarly situated in the five towns comprising the County Police District by persons who cannot and do not represent them, and by virtue of the voting strength of irrationally favored towns outside the County Police District.

46. That said Charter would not have been enacted by the legislature without the invalid provisions of Sections 201 and 203; that Sections 201 and 203 are inseparable from the remainder of the Charter and particularly Article XII and Section 1210(a) thereof.

47. That the geographical and voting structure and the creation of a half-county Police District has resulted in an unrepublican and unrepresentative government at the county level for plaintiffs, and all others similarly situated, and all citizens and taxpayers and electors of Suffolk County in general and of the Towns of Brookhaven, Islip, Smithtown, Huntington and Babylon and

the villages therein, in particular, regardless of whether they are included in the County Police District.

48. That if it is held and declared under the Charter and Sections 1206, 1207 and 1210(a) thereof that the Village is included within and is part of the County Police District or that its police functions are transferred to the County Police Department or that the real property within the Village, including that of plaintiffs and others similarly situated, is subject to taxation to pay the annual expenses of the County Police Department pursuant to Section 1210(a) of the Charter or that the Board of Trustees of the Village were and are not empowered to establish a police department in and for the Village whose members shall exercise the rights and duties of peace officers and law enforcement officers, the Charter, and Sections 201, 203, 1206, 1207 and 1210(a) thereof, and Sections 150 and 153(4) of the County Law and the creation of the County Police District and the geographic and voting structure of the Board of Supervisors deprive plaintiffs, and all others similarly situated, and the voting population in the towns and villages in the County Police District, in particular, of liberty and property without due process of law and deny them equal protection of the laws in violation of the said provisions of the State and Federal Constitutions; and that if it is held and declared under the Charter and Sections 1206, 1207 and 1210(a) thereof that the Village is not included within and a part of the Suffolk County Police District or that its police functions are not transferred, or that the real property within the Village, including that of plaintiffs and others similarly situated, is not subject to taxation, as aforesaid, or that the Board of Trustees were and are empowered to establish a police department, as aforesaid, still the Charter, and Sections 201 and 203 thereof and Sections 150 and 153(4) of the County Law and the geographic and voting structure of the Board of Supervisors

deprive plaintiffs, and all others similarly situated and the voting population in the Towns of Brookhaven, Smithtown, Huntington, Islip and Babylon, and all villages therein, including the Village of Port Jefferson, and in Suffolk County, in general, of liberty and property without due process of law and deny them equal protection of the laws in violation of said provisions of the Federal and State Constitutions.

49. That plaintiffs have no adequate remedy at law.

50. That the unconstitutionality of Sections 201 and 203 of the Charter renders the entire Charter, including Sections 1206, 1207 and 1210(a), void.

51. That a declaration of the constitutional validity of Sections 150 and 153(4) of the County Law and of the Suffolk County Charter and of the apportionment of the Board of Supervisors is essential to protect the rights to vote of plaintiffs and all others similarly situated embraced by the Civil Rights Act (42 USC Sections 1983 and 1988) and the laws of the State and to save them from continuous and unjustifiable discrimination and deprivation in violation of the Federal and State Constitutions.

52. That, unless they are enjoined from so doing, the defendant Board of Supervisors will continue to exercise their powers and perform their duties under the unconstitutional Charter and the cited provisions of the County Law, and the voting rights of plaintiffs and all others similarly situated will continue to be abused and diluted until valid statutes within constitutional limitations can be enacted by the legislature.

WHEREFORE, plaintiffs ask for judgment declaring the rights of the plaintiffs, and other similarly situated, and

their relationship to the Suffolk County Police District, and for other and further relief, as follows:

Under the first cause of action:

1. That the plaintiffs, residents, citizens, owners, electors, voters and taxpayers of the Incorporated Village of Port Jefferson and all others similarly situated were and are entitled to the same privileges, powers and rights conferred upon the electors and taxpayers of other villages organized under the Village Law, including the right to elect whether to become part of or remain separate from the County Police District and whether to transfer their police functions to the Suffolk County Police Department or to retain and exercise their police functions; and

2. That the Board of Trustees of the Village were and are empowered to establish a Village police department whose members shall exercise all rights, privileges, duties and responsibilities of peace officers and law enforcement officers as provided in the penal law, code of criminal procedure and other laws of the state and ordinances of the Village; and

3. That the Incorporated Village of Port Jefferson is separate from and not within or part of the County Police District; and

4. That Section 1210(a) of Chapter 278 of the Laws of New York 1958, known as the Suffolk County Charter, is not effective or applicable to said Incorporated Village of Port Jefferson and that none of the real property situated within said Village has been, is or will be subject to taxation to pay the annual expenses of the County Police Department pursuant to said Section 1210(a); and

5. That the defendants, as Board of Supervisors of the County of Suffolk, as County Treasurer, and as Receiver of Taxes of the Town of Brookhaven, respectively, and their successors, agents, employees and officers, be

restrained permanently from levying and collecting any tax upon any real property of the individual plaintiffs and of all others lying within the Incorporated Village of Port Jefferson to pay the annual expenses of the County Police Department as provided in Section 1210(a) of the Charter; and

6. That judgment directing the County Treasurer to pay to the Treasurer of the Incorporated Village of Port Jefferson pursuant to the duty imposed on the County Treasurer by Section 34 of the Village Law a sum of money representing taxes levied on and collected from said real property during 1962/1963 and 1963/1964 to pay the annual expenses of the Suffolk County Police Department is not sought herein for the reason that plaintiffs are advised and believe that said relief could not be claimed in this action but must be sought in a separate and independent Article 78 proceeding against said County Treasurer to require him to perform a duty enjoined upon him by said Section 34 of the Village Law, and said proceeding has been commenced in this Court and is now pending before any determination in this action in order to avoid any bar to said relief by the expiration of the four month period of limitations; provided, however, in the event said Article 78 proceeding is consolidated with this action or an order of this Court or justice requires that the relief sought therein be sought instead in this action then this complaint and request for judgment shall be deemed to adopt and repeat the statements and request for relief made in the pleading by the Incorporated Village of Port Jefferson by the Village Treasurer in that proceeding (which is attached hereto); and

7. That, if the Incorporated Village of Port Jefferson is held and declared under the Charter and Sections 1206, 1207 and 1210(a) thereof to be a part of the County Police District, or if Section 1210(a) of the Suffolk County Charter is held and declared to be effective and applicable

to said Village so that the real property of the individual plaintiffs and of all other similarly situated lying within the Incorporated Village of Port Jefferson is held and declared to be subject to taxation to pay the annual expenses of the County Police Department under Section 1210(a) of the Suffolk County Charter, or if it is held and declared that the police functions of the Village are transferred to the County Police Department or that the Board of Trustees of the Village were and are not empowered to establish a police department in and for the Village whose members exercise the rights and duties of peace officers and law enforcement officers generally, then plaintiffs, in any of these cases, ask for judgment under the second cause of action declaring that the Charter and Sections 1206, 1207 and 1210(a) thereof are void, invalid and violate the Constitutions of the State of New York and of the United States; and

8. That, under the third cause of action, and whether or not the Village is held and declared under the Charter and Sections 1206, 1207 and 1210(a) to be a part of the County Police District, whether or not the police functions of the Village are held and declared transferred to the County Police Department, whether or not the real property within the Village, including that of plaintiffs, and others similarly situated, is held and declared subject to taxation to pay the annual expenses of the County Police Department pursuant to Section 1210(a) of the Charter, whether or not the Board of Trustees of the Village were and are empowered to establish a police department in and for the Village whose members shall exercise the rights and duties of peace officers and law enforcement officers, the plaintiffs ask for judgment declaring Sections 150 and 153(4) of the County Law and the entire Charter, and particularly Sections 201 and 203, and 1206, 1207 and 1210(a) thereof are void, invalid and unconstitutional in that they deny plaintiffs, and all others

similarly situated, equal protection of the laws in violation of Article 1, Section 11, of the New York State Constitution and the Fourteenth Amendment to the Constitution of the United States, and in that they deprive plaintiffs and all others similarly situated of liberty and property without due process of law in violation of the due process clause of the New York State Constitution and the Fourteenth Amendment to the United States Constitution; and

9. That this Court restrain and enjoin defendant Board of Supervisors from continuing to exercise their power and perform their duties under the unconstitutional Charter and Sections 150 and 153(4) of the County Law and from continuing to abuse and dilute the voting rights of plaintiffs and all others similarly situated until valid statutes within constitutional limitations are enacted by the legislature; and that this Court retain jurisdiction of this clause until such time; and

10. That the plaintiffs have such other, different and further relief, decree or judgment in the premises as may be necessary to make effective the rights and relations declared herein, together with the costs and disbursements of this action; and

11. That no further or consequential relief other than as requested herein is or could be claimed.

ARTHUR S. BERGER
Attorney for Plaintiffs
Office & P. O. Address
405 East Main Street
Port Jefferson, N. Y.

(Unverified.)

EXHIBIT "A", ANNEXED TO COMPLAINT

At a Special Meeting of the Board of Trustees of the Incorporated Village of Port Jefferson held the 24th day of October, 1963, at the Village Hall in said Village,

WHEREAS, prior to the incorporation of the Village of Port Jefferson the Suffolk County police district was created consisting in part of the unincorporated territory of the Town of Brookhaven including the territory that became part of the Incorporated Village of Port Jefferson; and

WHEREAS, on or about April 10, 1963, said territory ceased to be part of the Suffolk County police district upon the incorporation of the Village of Port Jefferson by reason of the fact that, upon incorporation, the Village of Port Jefferson became possessed of the same status, powers and privileges granted to all villages, including the power to establish its own police department and to exercise police powers and functions; and to elect whether to become part of or remain separate from the Suffolk County police district; and

WHEREAS, on the 18th day of September, 1963, the Board of Trustees adopted a resolution to afford the electors of the Incorporated Village of Port Jefferson the right to determine and elect whether the Village of Port Jefferson should retain and exercise its police functions and remain separate from the Suffolk County police district; and

WHEREAS, a Special Election was held on the 17th day of October, 1963, at which a proposition to that effect was submitted to the qualified voters and at which a majority of the votes cast were in favor of the proposition and voted that the Village of Port Jefferson shall remain separate from the Suffolk County police district and shall retain and exercise its own police functions; and

WHEREAS, the Board of Trustees desires to affirm and carry out the expressed desire of the voters to retain and exercise the police functions of the Village of Port Jefferson and to remain separate from the Suffolk County police district and further desires to provide for the protection of the property and safety of its inhabitants and their property, and for the preservation of peace and good order and the general welfare by establishing a police department;

NOW, THEREFORE BE IT RESOLVED:

1. That the Incorporated Village of Port Jefferson is not now, and never has been, part of the Suffolk County police district, and is independent and separate therefrom.

2. That, pursuant to Section 188a of the Village Law of the State of New York, a Police Department in and for the Incorporated Village of Port Jefferson be, and the same hereby is, established.

3. That such personnel as may be necessary be employed for and on such terms and compensation as may be fixed by separate resolution. Within the Village the Village Police Department and the members thereof shall exercise all rights, privileges, duties and responsibilities of peace officers and law enforcement officers as provided by law.

4. That such building, land, motor vehicles, uniforms, communications systems, equipment and other matters and things, as may be necessary for said Police Department be purchased and the moneys therefor be appropriated by separate resolution.

5. That, pending the proper organization and functioning of said Police Department, the Mayor of the Village of Port Jefferson is authorized to enter into negotiations for a contract with the Suffolk County Police Department

for the provision of police protection at a price and upon terms to be set forth in said contract, and to submit any proposed contract to the Board of Trustees for review and final action.

6. That the Village Treasurer be, and he hereby is, directed to demand payment from Chester F. Jacobs, as Treasurer of the County of Suffolk, of such sum of money as represents the proportionate share of taxes levied and collected during the year of incorporation from territory within the Village of Port Jefferson to pay annual expenses of the Suffolk County Police Department for the period from April 10, 1963, to November 30, 1963, when the Village of Port Jefferson was not a part of the Suffolk County police district; and said demand shall contain an offer to cooperate to ascertain reasonably the amounts and proportion of taxes to which the Village of Port Jefferson is entitled.

7. That the real property situated within the Incorporated Village of Port Jefferson is not within, but is and has been separate from, the Suffolk County Police District and is not subject to future taxation by the Board of Supervisors pursuant to Section 1210 of the Suffolk County Charter or by the Suffolk County Treasurer or by the Town of Brookhaven to pay the annual expenses of the Suffolk County Police Department.

8. That a certified copy of this Resolution shall be served upon the County Executive, the Board of Supervisors of the County of Suffolk, on the Suffolk County Treasurer, and on the Town of Brookhaven and the Brookhaven Town Tax Receiver to apprise them of the intentions and actions of the Board of Trustees and inhabitants of the Incorporated Village of Port Jefferson, and to allow them to take action in relation to taxation and police matters in keeping with the tenor and intention of this resolution.

APPENDIX C

Judgment of the Court of Appeals Dated December 28, 1967

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 28th day of December in the year of our Lord one thousand nine hundred and sixty-seven, before the Judges of said Court.

Witness,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

REMITTITUR December 28, 1967.

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2. No. 201. 67

Incorporated Village of Port Jefferson, & ors., &c.,
Plaintiffs-Appellants,

vs.

The Board of Supervisors of the County of Suffolk, & ors.,
Respondents.

(and a proceeding).

BE IT REMEMBERED, That on the 21st day of April in the year of our Lord one thousand nine hundred and sixty-

seven, Incorporated Village of Port Jefferson, & ors., &c., the plaintiffs-appellants, and Paul D. Willcox, as Village Treasurer &c., the petitioner-appellant in this cause, came here unto the Court of Appeals, by Arthur S. Berger, their attorney—, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The Board of Supervisors of the County of Suffolk, & ors., the defendants-respondents, and the County Treasurer &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by George W. Percy, Jr., & ano., their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals, this cause having been submitted, after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs to the respondents Board and County Treasurer.

And it was also further ordered that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs &c., as aforesaid.

And thereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided,

to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, December 28, 1967.

[SEAL]

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

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(See cases cited in the preceding Jurisdictional Statement)

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Constitution of the United States, Equal Protection and Due Process Clauses, Fourteenth Amendment, Section 1 .... See references and Appendix A in preceding Jurisdictional Statement; see also here 2, 6

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* See text under respective headings in preceding Jurisdictional Statement.

New York Statutes:

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The Suffolk County Charter (Chapter 278 of Laws of 1958), including Article XII thereof, Sections 1206, 1207 and 1210(a)	See references and Appendix A in preceding Jurisdictional Statement; see also here 2, 3, 5, 6
The Village Law of the State of New York, Section 34	See references and Appendix A in preceding Jurisdictional Statement; see also here 2, 3, 5
Article 78, New York Civil Practice Law and Rules	2, 5

Federal Statute:

28 U. S. Code § 1257(2)	See references in preceding Jurisdictional Statement; see also here 3

IN THE

Supreme Court of the United States

October Term, 1967

No.

In the Matter of the Application of

PAUL D. WILLCOX, as Village Treasurer of the Incorporated Village of Port Jefferson,

Appellant,

against

THE COUNTY TREASURER OF THE COUNTY OF SUFFOLK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

As already indicated in the footnote at page 10 of the annexed Jurisdictional Statement in the case entitled "Incorporated Village of Port Jefferson, Robert L. Robertson and Robert E. Link, on behalf of themselves and all others similarly situated owners, taxpayers, voters, residents, electors and citizens, in the Incorporated Village of Port Jefferson, in the Towns of Brookhaven, Smithtown, Huntington, Islip and Babylon, and in every Village to be incorporated in said Towns hereafter, Appellants, against, The Board of Supervisors of the County of Suffolk, the County Treasurer of the County of Suffolk, and the Receiver of Taxes of the Town of Brookhaven, Appellees",

this proceeding, started December 13, 1963 (R. 259)* was instituted under Article 78 of the New York Civil Practice Law and Rules for judgment directing appellee to perform a duty enjoined upon him by Section 34 of the Village Law of the State of New York and to pay to the appellant Treasurer of the Incorporated Village of Port Jefferson proportional taxes collected by appellee for County Police District purposes against real property in the Incorporated Village of Port Jefferson. The appellant in this proceeding is the Village Treasurer of the appellant Incorporated Village of Port Jefferson in the case and the appellee County Treasurer of the County of Suffolk in this proceeding is the same appellee of that title in the case. Both the appellant and this appellee are jointly interested in and directly affected by the judgment of the Court of Appeals being appealed to this Court which relates to the superseding of Section 34 of the Village Law by Article XII of the Charter and sustains the constitutionality of Article XII of the Charter under the Fourteenth Amendment to the Federal Constitution. Both proceeding and case present on their respective appeals the same basic question described as Question 4 in the foregoing Jurisdictional Statement under "Questions Presented". In the courts below, this proceeding was tried and heard jointly with the case. In the Supreme Court, Suffolk County, the case and proceeding were tried jointly in the trial court (R. 67, 105) and the petition in the proceeding (R. 45-58) was dismissed "for the same reasons" (R. 250) that the complaint was dismissed. Thereafter, this proceeding, jointly with the case, was appealed to and determined by the Appellate Division, Second Judicial Department, and subsequently this proceeding was appealed, again together with the case, to the Court of Appeals in which, without opinion, there was an affirmance of the Appellate Division

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* Numbers in parentheses refer to pages in the record to be filed in this Court.

order affirming the judgments of the lower court and dismissing both the proceeding and the case (R. 271). Both this proceeding and the case share common questions of law and fact (R. 55, 67), are included in the same record to be certified and transmitted to this Court, and, as the petition in this proceeding alleged both Section 34 of the Village Law (R. 52-53) and Article XII of the Charter, Sections 1206, 1207 and 1210(a) (R. 46-48), both this proceeding and the case involve the same state statutes and draw into question the validity of Article XII of the Charter. This Court, under 28 U. S. Code Section 1257(2) and the reasons and authorities set forth in the foregoing Jurisdictional Statement filed in the companion case, has jurisdiction of this proceeding. Appellant, in this proceeding, also appealing to this Court from the judgment of affirmance of the Court of Appeals, joins in the appeal to this Court by the appellants in the case.

Appellant, joining in the appeal, appeals from the same final judgment as the appellants in the companion case and as described in the foregoing Jurisdictional Statement for that case. A separate Notice of Appeal was filed by appellant with the clerk of Suffolk County, in the Court of Appeals, in the Appellate Division, Second Judicial Department, and in the Supreme Court, Suffolk County, on the 31st day of January, 1968, the same day as appellants in the case filed their Notice of Appeal.

Citations to Opinions Below

Jurisdiction

Constitutional and Statutory Provisions

Question Presented

Statement

The Questions Are Substantial

Conclusion

It would be repetitious to restate under the foregoing headings all that was stated in the Jurisdictional Statement which precedes this one and which is being filed in the companion, jointly heard and determined case. All that was stated there under Citations to Opinions Below, Jurisdiction, Constitutional and Statutory Provisions, Question Presented, The Questions Are Substantial and Conclusion, and all that was recited under "Statement" for that case, with particular reference to Question 4, is pertinent here and was similarly admitted or established at the trial. Appellant asks that the statements made in the foregoing Jurisdictional Statement, as they extend to Question 4 on this appeal, be deemed incorporated here. Appellant will limit himself to highlighting in the following summary form only some other aspects that relate more appropriately and directly to this proceeding:

1. That on and after the date of its incorporation, on April 10, 1963, the Incorporated Village of Port Jefferson was not included in the County Police District (R. 53-54).

2. That appellee has received and collected as part of his duties $237,002.90 in taxes levied and collected for the

year of incorporation (1963) against real property in the Village to pay annual expenses of the Suffolk County Police Department and will collect and receive more of such taxes in the following year (R. 55).

3. That the territory in the limits of the Incorporated Village of Port Jefferson was part of the County Police District only until it became incorporated as a Village on April 10, 1963, and was not included thereafter and was not included in the County Police District for a period of 235 days of the year beginning December 1, 1962, and ending November 30, 1963, that 253/365 of the sum of $237,002.90 for 1962/1963 and for all taxes for 1963/1964 should be paid to appellant pursuant to Section 34 of the Village Law which statute imposed a duty on appellee to make such proportionate payment of taxes to appellant (R. 56-57).

4. That before institution of this Article 78 proceeding written demand pursuant to Section 34 of the Village Law was made upon appellee by appellant for proportionate repayment of taxes, which demand and payment were refused by appellee who fails to perform the duty enjoined on him by statute to make payment (R. 57). No part of the taxes claimed as owing to the Village have been paid (R. 58).

The answer of the appellee (R. 59-61) contains general denials and no affirmative defense, admitting, among other things, demand for payment and refusal (R. 61).

5. That the opinions below of the trial court and Appellate Division in dismissing appellant's petition as well as the complaint in the companion case held that Article XII of the Charter modified and superseded Section 34 of the Village Law, modified various rights of the Incorporated Village of Port Jefferson so that, insofar as Section 34 directed the treasurer of a county to pay to the treasurer of a newly incorporated village taxes collected for municipal

district purposes, appellant was not entitled to a proportionate repayment of taxes collected for County Police District purposes, and said opinions further held that Article XII, in denying these rights, was not violative of the Fourteenth Amendment to the Constitution of the United States. These opinions and judgments, as in the companion case, were affirmed by the Court of Appeals without opinion. The judgment of the Court of Appeals is in direct conflict with the Fourteenth Amendment to the Constitution of the United States and would discriminate against local governments, villages in particular, and impair their rights and charters, solely on the ground of their date of incorporation. The judgment should be reviewed and, if reversed in the companion case, should be reversed with respect to this proceeding.

Respectfully submitted,

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Main Street,
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516-HR-3-2200.

ARTHUR S. BERGER,
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Port Jefferson, New York, 11777,
516-HR-3-2200.

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SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
FEB 26 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 1152

INCORPORATED VILLAGE OF PORT JEFFERSON, ROBERT L. ROBERTSON and ROBERT E. LINK, on behalf of themselves and all others similarly situated owners, taxpayers, voters, residents, electors and citizens, in the Incorporated Village of Port Jefferson, in the Towns of Brookhaven, Smithtown, Huntington, Islip and Babylon, and in every Village to be incorporated in said Towns hereafter,

Appellants,

against

THE BOARD OF SUPERVISORS OF THE COUNTY OF SUFFOLK, the COUNTY TREASURER OF THE COUNTY OF SUFFOLK, and the RECEIVER OF TAXES OF THE TOWN OF BROOKHAVEN,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

IN THE

October Term, 1967

No. 1152

IN THE MATTER OF THE APPLICATION OF PAUL D. WILLCOX, as Village Treasurer of the Incorporated Village of Port Jefferson,

Appellant,

against

THE COUNTY TREASURER OF THE COUNTY OF SUFFOLK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPENDIX TO JURISDICTIONAL STATEMENTS

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SUPREME COURT, SUFFOLK COUNTY

SPECIAL TERM—PART II

Index No. 111961 5/4/64

Dated December 18, 1964

INCORPORATED VILLAGE OF PORT JEFFERSON, et al.,
Plaintiffs,

vs.

THE BOARD OF SUPERVISORS OF THE COUNTY OF SUFFOLK, THE COUNTY TREASURER, etc.,
Defendants.

IN RE PAUL D. WILLCOX, as Village Treasurer, etc., Village of Port Jefferson,
Petitioner,

vs.

THE COUNTY TREASURER OF THE COUNTY OF SUFFOLK,
Respondent.

ARTHUR S. BERGER, Esq.,
Attorney for Plaintiffs and Petitioner
405 East Main Street
Port Jefferson, New York

GEORGE W. PERCY, JR., Esq.,
Suffolk County Attorney
Attorney for Defendants and Respondent
Suffolk County Center
Riverhead, New York

1. *Opinion of the Supreme Court, Suffolk County (Memorandum by Munder, J. S. C.), December 18, 1964*

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Co-plaintiffs in this action are the Incorporated Village of Port Jefferson, Robert L. Robertson, the village mayor, and Robert E. Link, the two latter being residents and taxpayers of the Village of Port Jefferson. They seek a judicial declaration that the incorporation of the Village automatically effected its dissociation from the Suffolk County Police District. They assert a right to such relief on several grounds set forth in the first cause of action stated in the complaint, and demand to be restored the amounts paid by the inhabitants of the said incorporated village for real property taxes for the years 1962/1963 and 1963/1964 for the maintenance of the Suffolk County Police District, and ask that the defendants be restrained from collecting any future taxes for that purpose from the inhabitants of said incorporated village.

For a second cause of action, in the event that it is determined that the Village is still a part of the county police district, they ask that the Suffolk County Charter particularly Sections 1206, 1207 and 1210(a) thereof which have to do with the creation, establishment and support of the Suffolk County Police District, be declared invalid as being violative of both the State and Federal Constitutions in many respects, to be separately considered below.

As a third cause of action, whether or not the Village is held to be a part of the county police district, the plaintiffs seek a declaration of unconstitutionality of Sections 150 and 153 (4) of the County Law and the entire Suffolk

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County Charter, because of the disproportionate voting strength of the town supervisors on the County Board of Supervisors. This they claim constitutes a violation of the due process and equal protection clauses of both the State and Federal Constitutions.

The facts are undisputed. By Chapter 278 of the Laws of 1958 the Suffolk County Charter became a law effective on March 21, 1958. It required the submission of a resolution at the general election in 1958 to the electors of the county before it became operative as the charter of government for Suffolk County. Upon its adoption by the electorate of the County in November of 1958 it became generally effective on January 1, 1960, following the election of the county executive pursuant to its provisions at the general election of 1959.

At the time of the referendum on the Charter there was also submitted to the electors of all the towns and incorporated villages a proposition for the creation of a county police department in Suffolk County and the transfer to such county police department of the police functions of the towns and villages. It was to be established only if three or more contiguous towns elected to become part of the county police district. At the 1959 referendum the five western and contiguous towns elected to become part of the county police district and transfer their police functions to it. Several of the larger incorporated villages within those towns also so elected. Among the towns so electing was the Town of Brookhaven. One provision of Section 1207 of the Suffolk County Charter is that "(t)he election of any such town or village shall be irrevocable".

Following the referendum the Suffolk County Police District was created consisting of the unincorporated territory of the five contiguous towns which had elected to

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become part thereof and the territory of the incorporated villages within such five contiguous towns which had elected to transfer their police functions to such district.

The territory of the present Incorporated Village of Port Jefferson was then a part of the unincorporated area of the Town of Brookhaven. On April 10, 1963, more than three years after the creation of the Suffolk County police district, the Village of Port Jefferson was incorporated. On October 17, 1963, at a special election of the Village pursuant to a resolution of the Village Board, the electors voted that the Village remain separate from the police district and retain its own police function. Obviously the submission of this proposition was predicated on the assumption that upon the incorporation of the Village it ceased to be a part of the Suffolk County Police District.

The plaintiffs apparently base this assumption on Sections 34 and 35 of the Village Law under which they claim that, subsequent to its incorporation, a village's liability to a "special district" partly included within its boundaries extends only to payment of a proportionate share of the indebtedness previously incurred for such purposes while the "territory (of the village) was a part of such district". Both of these sections begin "If the territory so incorporated as a village includes within its boundaries part of a special district established by the town of a sewer, water, light, fire, park, health, police or any other special district for municipal purposes * * *".

Such a contention might be easily answered, as suggested by the defendants' counsel, by emphasizing the words "special district established by the town" and pointing out that the Suffolk County Police District was established under the Suffolk County Charter rather than under the Town

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Law. But *Davies* v. *Cheshire,* 225 App. Div. 822, 232 N. Y. S. 477, would, I think overcome that argument. There the after-incorporated village was declared to be dissociated from the separate, special police district comprised of Nassau County outside of cities and villages although the Nassau County police district was established by the Legislature and not by a town or towns. A few years after the *Davies* decision, Mr. Justice Hagarty, who had participated in the *Davies* decision, wrote in *Village of Kensington* v. *Town of North Hempstead,* 236 App. Div. 340, at 346, 258 N. Y. S. 355, at 363:

> "Plaintiff cites Matter of Davies, as Treasurer of the Village of Matinecock v. Cheshire, County Treasurer, 255 App. Div. 822, 232 N. Y. S. 477, where this Court reversed an order denying a motion for a preemptory mandamus order, requiring the county treasurer to refund money to the village, collected as taxes for the support of the Nassau County police district. That case hinged upon the construction of the Nassau County Police Act as amended. The question there was whether or not the Village of Matinecock, Nassau County, became a special district for county police purposes upon its incorporation on the 2nd day of April, 1928. Our conclusion was that the legislation embraced within the enactments considered showed a policy to leave the villages and cities free to exercise their delegated powers to establish a police force."

And at 236 App. Div. 349, 258 N. Y. S. 366, he further stated:

> "It was decided under Laws of 1925, c. 451, § 3, which, as amended by Laws of 1926, c. 3, § 1, provided: 'The county of Nassau, outside of a city or village

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> or a police district established pursuant to article fourteen-a of the town law, is hereby constituted a separate police district'. It is apparent that this court decided that the general language included villages thereafter incorporated."

It is clear from these explanatory remarks that the decision in the *Davies* case turned on legislative intent as determined from the language used.

In our case the question is easily resolved. The Suffolk County Charter under which the county police district was created provides in Section 103 that "(a)ll special laws relating to Suffolk County and all general laws of the state shall continue in full force and effect except to the extent that such laws have been amended, modified or superseded in their application to Suffolk County by enactment and adoption of this charter". Thus if the Village Law is in conflict with the Suffolk County Charter for provisions of the charter prevail. Then, too, in Section 1207 of the Suffolk County Charter, after providing for the creation of the county police district, it is provided that "(t)he election of any such town or village shall be irrevocable".

It is difficult to see how much more emphatically the Legislature could have framed its language to demonstrate its intention that, once created, the police district would not thereafter, by any device, be whittled down. That this is consonant with an express legislative policy, at least in respect to the fast growing counties of Nassau and Suffolk, is shown by the enactment of Chapter 450 of the Laws of 1930, amending Section 802 of the County Government Law of Nassau County (Nassau County Charter), in which it is said:

> "All portions of any town, unincorporated as a village or a city at the date on which this act becomes

effective in the county or not included in a town police district on such date, irrespective of the inclusion thereof in a village or city incorporated or erected after such date, shall continue to be a part of the county police district, provided, however, this shall not apply to any territory which may hereafter be annexed to a city or village existing at the date on which this act becomes effective."

Davies v. *Cheshire*, so greatly relied upon by the plaintiffs, in the light of this later amendment to the Nassau County Charter, would, I think, have been differently decided.

Of passing interest, is the case of *O'Hara* v. *Board of Supervisors*, 42 Misc. 2d 716, 248 N.Y.S. 2d 535, aff'd by the Appellate Term, Second Department, N.Y.L.J., November 30, 1964, p. 17, col. 6, in which it was held that for tax purposes the Suffolk County police district is not a "local" district, but an arm of the county government, and that the tax to pay the expense of its maintenance was a general county tax levy as to which a veteran's exemption applied. It might also be argued that this legislature-created arm of the county government is not a "special district" within the meaning of Sections 34 and 35 of the Village Law.

It follows, then, that the act of incorporation did not automatically dissociate the Village from the Suffolk County Police District which its inhabitants, prior to incorporation, as residents of Brookhaven Town, had irrevocably elected to join. The first cause of action must, therefore be dismissed.

In their second cause of action the plaintiffs claim the application of Sections 1206, 1207 and 1210(a) of the Suffolk County Charter to the Incorporated Village of Port Jefferson to be unconstitutional for the following reasons:

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(1) The Charter, if so applied, would, by amending the general provisions of the Village Law with respect to Suffolk County, constitute a "local bill" "(i)ncorporating villages" in violation of Article 3, Section 17, of the New York State Constitution. (2) The Charter, if so applied, would constitute a transfer of a function of local government (police) in violation of Article 9, Section 2 of the New York State Constitution. (3) The Charter, if so applied, would, by not permitting the Village the same privileges of voting on the question of transferring their police functions as pre-existing villages, constitute a denial of equal protection of the laws in violation of Article 1, Section 11 of the New York State Constitution and of the Fourteenth Amendment to the Constitution of the United States. (4) The Charter, if so applied, would, by imposing upon the Village the authority of the county police department, constitute a deprivation of the Village's right of self government and home rule in violation of the provisions of "Article 9, Section 8, of the New York State Constitution" (sic). (5) The Charter, if so applied, would by imposing an unfair tax burden upon the taxpayers of the Village, constitute a deprivation of liberty and property without due process of law in violation of Article 1, Section 6, of the New York State Constitution and the Fourteenth Amendment to the Constitution of the United States. (6) And, finally, the Charter, if so applied, would, in making the election of a town to become part of the County Police District irrevocable, constitute a disenfranchisement of the people of the Village in violation of Article 1, Section 1, of the New York State Constitution.

The police provisions of the Charter have the effect of superseding a newly incorporated village's authority under

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Section 188-a of the Village Law to establish its own police department. While the constitutional prohibition against local bills "(i)ncorporating villages" (Art. 3, § 17, N. Y. State Constitution) has been held to cover not only the original incorporation of a village but any subsequent alteration of its charter (*Abel* v. *Clarkson*, 237 N. Y. 85, 142 N. E. 360); *Cutler* v. *Herman*, 3 N. Y. 2d 334, 165 N. Y. S. 2d 449), I find no case law that holds the prohibition to extent to after-incorporation villages. The legislation here under attack was enacted long prior to the incorporation of the Village. It did not incorporate a village nor did it in any way affect the charter of any existing village. The County Charter was designated an "Act to provide an alternative form of government for Suffolk County", and adopted in accordance with the provisions of Article 9 of the New York State Constitution. The sections devoted to the creation of a county police district applied equally to the residents of all unincorporated areas. The subsequent decision of the residents of the Village of Port Jefferson to incorporate should not permit them to destroy what they helped to create under a provision that such action was irrevocable. Even a preexisting village voting to transfer its police functions to the county police district may not thereafter withdraw.

The charge that the enactment of the Charter operated to "transfer" a function of local government from the Village without the majority consent of its electors in violation of Article 9, Section 2, of the State Constitution, then in effect, simply is not tenable. The Village was not in existence at the time the Charter was enacted, and at the time of its incorporation the function of local government in question was one which the Village had no initial right to exercise.

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Because, as taxpayers of the subsequently incorporated Village of Port Jefferson, the residents thereof did not inherit the right to vote upon and choose their own form of police protection, the pertinent sections of the Charter are said to constitute discriminatory and class legislation in violation of the equal protection clauses of the State and Federal Constitutions. When the Charter was enacted it affected all persons similarly situated in the same manner. The residents of Port Jefferson, as individuals, were accorded the same privilege to vote for or against becoming a part of the county police district as was every other resident of the unincorporated areas of the county, which choice they were warned was to be irrevocable. Having voluntarily elected to become a part of the police district they should not be permitted a re-vote on the very same question. Rather than their being denied equal protection of the laws, they seek an unequal privilege.

In answer to the plaintiff's claimed deprivation of home rule in violation of Article 9, Section 8, of the State Constitution, it is not clear just how the cited section reserves to a village the right to perform its own police functions. It is clear, however, that what Chief Judge Denio said in 1857 in *People ex rel. Wood* v. *Draper*, 15 N.Y. 532 at 546 as to the then controlling constitution is as apt today in respect to the current constitution. He said:

> "This position would be unassailable if it could be maintained that the object of police had, by any constitutional provision or arrangement, been irrevocably committed to the counties and cities. But there is nothing in the Constitution directly touching the subject of police. If such a provision exists, it must, therefore, be an implied one, and nothing is suggested from which it can be implied, unless it is the provision that county and city officers shall be chosen

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> in counties and cities. But this does not prove that the then existing functions of county and city officers were always to continue and to be performed in the cities and counties. No one will contend that the Legislature could not abolish the office and the functions of any officer whose office was not a constitutional one, but was one created simply by a legislative act."

I find the contentions of counsel, that the Charter, if construed so as to make the plaintiff Village irrevocably a part of the county police district, would violate the due process clauses of the State and Federal Constitutions by imposing an unfair tax burden, and in disenfranchising the people by not according them the right to vote again, to be without merit. Having been created as a unit of the county government by popular referendum in accordance with the Charter, the legislative implementation of the constitutional authority for an alternative form of county government, the county police district should not be disembodied except by approval of a majority of the electors of the entire district. The plaintiffs seek, by a change of hats, to avoid unilaterally their own prior commitment. The sanctity of a contract which would bind a private person should be no less cogent, in this circumstance, in respect to the village.

The Suffolk County Charter, in addition to its enactment being specifically authorized by the Constitution of the State of New York, must itself be "presumed to be constitutional, and every intendment is in favor of its validity." *Farrington* v. *Pinckney*, 1 N. Y. 2d 74, 150 N.Y.S. 2d 585 and cases therein cited; McK. Statutes, § 150. Having been sanctioned by both the legislative and the executive branches of state government it may be struck down only if it is clearly repugnant, directly or

by necessary implication, to the constitution. Here the legislation offends no express limitation nor any necessarily implied inhibition.

In the third cause of action the court is asked to declare unconstitutional Sections 150 and 153 (4) of the County Law and the entire Charter, particularly Sections 201 and 203, and 1206, 1207 and 1210 (a) thereof, as being violative of the due process and equal protection clauses of both State and Federal Constitutions, and to enjoin the defendant Board of Supervisors from continuing to exercise the power conferred by these provisions of law pending the enactment by the Legislature of constitutionally valid statutes and valid apportionment which will protect the voting rights of the plaintiffs and others similarly situated. These sections, which relate to the composition, general powers and voting structure of the County Board of Supervisors, and its powers to create and maintain a county police district, are claimed to be unconstitutional because of the disproportionate representation and voting strength provided each Town on the Board of Supervisors, with but one supervisor and one vote for each Town within the County regardless of population, which in each instance varies considerably.

This attack on the ground of disproportionate representation is, of course, based on the recent decisions of the United States Supreme Court, commencing in March 1962, with *Baker* v. *Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. ed. 2d 663 (in which it was held that the equal protection clause of the Fourteenth Amendment of the Federal Constitution would be violated by a statute apportioning legislative districts arbitrarily, and that the plaintiffs had standing to challenge the Tennessee Apportionment Act), and followed in June of this year by *Reynolds* v. *Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. ed. 2d 506; *W. M. C. A.* v. *Lomenzo*, 377 U.S. 533, 84 S. Ct. 1418, 12

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L. ed. 588; *Maryland Committee* v. *Tawes*, 377 U.S. 656, 84 S. Ct. 1442, 12 L. ed. 595, and others. These cases involved the legislatures of several states, and it was consistently held that the equal protection clause requires that the houses of a bicameral state legislature be apportioned substantially on a population basis. They, however, deal only with the apportionment of state legislatures. In New York State the question as to whether the equal protection clauses of our State and Federal Constitutions require a strict one-man, one-vote republican form of government below the state level remains unresolved.

In the wake of these recent U. S. Supreme Court decisions, the doctrine of *Reynolds* v. *Sims* was applied by a state circuit court in the State of Michigan to the challenged apportionment of the Kent County Board of Supervisors in the case of *Brouwer* v. *Bronkema* (September 11, 1964). In that case the court held that the equal protection clause of the Fourteenth Amendment to the United States Constitution "requires that the seats in the Board of Supervisors be apportioned on a population basis • • • ", though the Michigan Constitution did not so require.

It must be borne in mind, however, that the County of Kent is comprised of twenty-two townships and eight cities, and that there had been a definite attempt on the part of the Michigan State Legislature to apportion the members of the Board of Supervisors among the several towns and cities. It was this very legislation, in a state wherein the county was considered the basic unit of government, that was held to be in conflict with the U.S. Constitution, as establishing apportionment that was not on a population basis. In this state, and particularly in eastern Long Island where the communities patterned their local government upon that of New England, the

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town was always considered the dominant unit of administration. (See, Early History of Town Government in New York State by Hon. Frank C. Moore, in the preface to the Town Law, Book 61, McKinney's Consolidated Laws). As early as 1703 a law was enacted by the General Assembly of the Colony of New York to provide for the election of one supervisor in each town at the annual town meeting for the sole purpose of representing the town on the board of supervisors of the county. Chapter 131, Laws of 1703. In 1777, the Constitution of the State of New York was adopted. The Constitution so adopted recognized the fourteen counties then in existence, among them Suffolk County, and town government continued to function substantially as it did under English rule.

There is no claim that the supervisors of the towns of Suffolk County are elected on a disproportionate basis; and, since the adoption of the first State Constitution there has been *no* attempt on the part of the Legislature to apportion the members of the Suffolk County Board of Supervisors among the several towns. There are no cities in Suffolk County nor any special wards or districts for the election of supervisors. Each is chosen by the entire electorate of his town and solely by reason of such election to the town office and by virtue of his occupancy thereof does he sit upon the Board of Supervisors. County Law, § 150; Town Law, § 20; *Lane* v. *Johnson*, 283 N.Y. 244, 28 N.E. 2d 705. There has, then, been no legislation subsequent to the adoption of the State and Federal Constitutions that can be declared to be in conflict with the equal protection clauses thereof, the basic unit of local government within this County having remained virtually unchanged since colonial times.

There is presently pending in the United States District Court for the Eastern District of New York, a civil rights class action seeking a judgment declaring as unconstitu-

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tional the Suffolk County Charter. A motion to dismiss the complaint was denied by the court which held that the allegations of the complaint stated a justiciable constitutional cause of action, citing the *Baker* case. *Bianchi* v. *Griffing*, 217 Fed. Supp. 166. The motion was renewed before a three-judge statutory court and is, as yet, undecided. Under these circumstances, and in view of the lack of appellate court precedent in New York State, I think it would be inappropriate for this court, a state court of first instance, to make the novel determination that the equal protection clauses of our State and Federal Constitutions require that the towns of Suffolk County should elect a greater number of supervisors or that the vote of each supervisor should be weighted so that a form of proportional representation on a population basis will obtain in respect to the Suffolk County Board of Supervisors and thus overturn the governmental system which has been continuously in practice for more than 260 years. I prefer to rest on the presumption of constitutional validity of the legislation herein assailed. McK. Statutes, § 150.

The complaint is therefore dismissed.

The companion proceeding herein, whereby the Treasurer of the Incorporated Village of Port Jefferson seeks from the County Treasurer a refund of all sums representing taxes levied and collected against real property within the Village since its incorporation to pay annual expenses of the County Police Department, is, for the same reasons, also dismissed.

This shall constitute the decision of the court pursuant to CPLR, 4213(b).

Submit separate judgments accordingly.

FJM
J. S. C.

2. Opinion of the Appellate Division, July 15, 1966

(N.Y.L.J., July 15, 1966)

BELDOCK; *P.J.*; UGHETTI, BRENNAN, HOPKINS and BENJAMIN, *JJ.*

Incorporated Village of Port Jefferson, ap. v. *Board of Supervisors of the County of Suffolk.*

In an action for a declaratory judgment and other relief, and in a special proceeding to compel the Suffolk County Treasurer to perform certain duties allegedly required of him by section 34 of the Village Law, the plaintiffs in the action and the petitioner in the special proceeding appeal from separate judgments of the Supreme Court, Suffolk County, entered January 5, 1965, which, after a nonjury trial, dismissed the complaint and petition on the merits.

Judgments affirmed, without costs.

The basic relief sought by plaintiff Village in this action and special proceeding is its withdrawal from the Suffolk County Police District in order to establish its own village police department.

The County Police District was created pursuant to article XII of the Suffolk County Charter, which was enacted by the State Legislature in 1958, adopted in that same year by a referendum vote of the electors of Suffolk County, and went into effect in January 1960. At the time of such referendum, the electors of each of the town and villages of the County additionally voted on a separate proposition for the creation of a county police district and the transfer thereto of the police functions of said town or village. The creation of the County Police District was approved by the electorate and, by their votes on this proposition, the five western towns of the County, and several of the larger incorporated villages within them, elected to join the County Police District and to transfer

their police functions to it. Among the towns so voting to join the County Police District was the Town of Brookhaven. At the time such election was made, plaintiff Village had not yet been incorporated; its territory was then part of the unincorporated area of the Town of Brookhaven; and the residents of its territory voted as electors of the Town on the questions of adoption of the Charter and the transfer of the Town's police functions to the County Police District. Section 1207 of the Charter provides, inter alia, that the election of any town or village to become part of the County Police District "shall be irrevocable." In 1963 (three years after the Town of Brookhaven joined the County Police District) plaintiff village was incorporated. Its electors thereafter voted to remain out of the County Police District and establish a Village Police Department, apparently on the assumption that the village territory ceased to be part of the County Police District when the village was incorporated. Defendant County Board of Supervisors opposed this determination by the village; and the County Police Department continued to operate within the village. This action and special proceeding were then instituted.

Plaintiffs' main contention is that sections 201 and 203 of the County Charter (which deals with the constitution and voting procedure of the Board of Supervisors) are invalid because they violate the one-man, one-vote principle; that the invalidity of these sections makes the whole charter invalid, including Article XII, under which the County Police District was created; that the invalidity of the entire charter, including Article XII, makes section 34 of the Village Law the controlling statute; and that pursuant to that section the village ceased to be a part of the County Police District when the village was incorporated. Alternatively, plaintiffs contend that even if the charter is valid, its enactment and adoption did not modify said section 34 or make it inapplicable to plaintiff village; and

that even if the rest of the charter is valid, Article XII thereof (dealing with the County Police District) is unconstitutional for a variety of reasons, and that said section 34 consequently is controlling.

On June 15, 1966, the Statutory Court, established to hear and determine federal cases involving the one-man, one-vote question, ruled that section 203 of the Suffolk County Charter was invalid because it violates the one-man, one-vote principle; it directed that the County Board of Supervisors temporarily use a weighted system of voting; and it directed the Board of Supervisors to submit a plan for the reconstitution of itself or of another county legislative body, which could be submitted to the county's voters for approval as an amendment to the County Charter (see *Bianchi* v. *Griffing et al.*, decided June 15, 1966).

Considering the question pragmatically (*People ex rel. Alpha P. C. Co.* v. *Knapp*, 230 N. Y. 48, 60), and in light of all the circumstances of the enactment and adoption of the subject charter by an overwhelming majority of the voters of the entire county (including its populous western half which contained more than 90 per cent of the total county population and which, according to the *Bianchi* decision, was discriminated against by section 203) we believe the invalidity of section 203 does not require the striking down or the entire charter, since we cannot say that the Charter would have been rejected had section 203 been excinded and replaced by some other provision for a legislative body. Indeed, in view of the above-mentioned facts it well may be that the Charter would have been adopted by an even more overwhelming majority were section 203 not in it. In our opinion, then, the invalidity of section 203 does not invalidate the rest of the Charter.

We see no merit in any of the attacks on article XII of the Charter on constitutional grounds. We believe that that article modified and superseded section 34 of the Village Law in the respects here relevant (see section 103

of the Charter). Hence, when plaintiff village was incorporated, its rights under section 34 were those given by that section *as modified by article XII of the Suffolk County Charter*.

Article XII provides that the election of a town or village to join the County Police District is irrevocable. We construe that provision to mean only that there can be no *unilateral* secession of a town or village from the County Police District after it has elected to join it. So construed, we believe that provision is valid.

When the Town of Brookhaven elected to join the County Police District, its election was binding upon the residents of all the town's then unincorporated areas, including the area now included within plaintiff village. By subsequently incorporating, the residents of the village did not acquire the right to a second vote on the question whether they should join the County Police District. Such second vote would, if permitted, give them unequal and greater rights than the residents of any other towns and villages, who are bound by their original votes; and it would allow them to renege on a commitment made on behalf of all the residents of the Town of Brookhaven when the majority of those residents, including themselves, voted to join the County Police District.

For all these reasons, we believe there is no merit in this action and special proceeding, and that the judgments dismissing them should be affirmed.

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1152

INCORPORATED VILLAGE OF PORT JEFFERSON, ROBERT L. ROBERTSON and ROBERT E. LINK, on behalf of themselves and all others similarly situated owners, taxpayers, voters, residents, electors and citizens, in the Incorporated Village of Port Jefferson, in the Towns of Brookhaven, Smithtown, Huntington, Islip and Babylon, and in every Village to be incorporated in said Towns hereafter,

Appellants,

against

THE BOARD OF SUPERVISORS OF THE COUNTY OF SUFFOLK, the COUNTY TREASURER OF THE COUNTY OF SUFFOLK, and the RECEIVER OF TAXES OF THE TOWN OF BROOKHAVEN,

Appellees.

IN THE MATTER OF THE APPLICATION OF PAUL D. WILLCOX, as Village Treasurer of the Incorporated Village of Port Jefferson,

Appellant,

against

THE COUNTY TREASURER OF THE COUNTY OF SUFFOLK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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OCTOBER TERM, 1967

No. 1152

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Appellant,

against

THE COUNTY TREASURER OF THE COUNTY OF SUFFOLK,

Appellee.

MOTION TO DISMISS OR AFFIRM

Appellees in the above entitled action and proceeding move, pursuant to Rule 16 of the Revised Rules of the

Supreme Court of the United States, to dismiss on the ground that there is no substantial federal question involved or that the final judgment of the Court of Appeals of the State of New York be affirmed on the ground that although a federal question was raised it was not expressly passed upon and there was an independent, tenable, nonfederal question that could be the basis for the state court's action.

This motion and the argument apply to the action and proceeding as though consolidated.

I

The is no substantial federal question involved.

Appellees concede that the appellants raised and preserved from the outset of this litigation the question of the constitutionality of those sections of the Suffolk County Charter which provide for the county's legislative body and the manner in which the members thereof vote. They would agree, too, that a case having to do solely with that question—a reapportionment case—might present a substantial federal question. Indeed, the appellee Board of Supervisors has been litigating just such a case in the federal courts since 1962 (*Board of Supervisors of Suffolk County* v. *Bianchi,* 387 U. S. 97).[1]

The presence of a substantial federal question in a given case must be considered in the light of the posture of the entire matter before the Court.

Here, what might, standing alone, be a substantial federal problem, is rendered quite insubstantial because the federal problem is but a small facet of the entire case.

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[1] In the lower courts: *Bianchi* v. *Griffing,* 238 F. Supp. 997; 497.

Moreover, inasmuch as the New York Court of Appeals affirmed without opinion (Jurisdictional Statement, C-1-C-3), there is no decision holding the statute to be either consistent or inconsistent with the federal constitution. Thus there is no substantial federal question *presented.*

The appellant's position is that not only were federal questions presented and preserved; they were necessarily involved. Appellees contend both of these factors must be shown and that appellant has failed to establish the federal questions were necessarily involved. A federal question, we submit, is *necessarily involved* (where there is no highest state court opinion) only when the case cannot be disposed of without considering the federal question (*Lawrence* v. *State Tax Commission,* 286 U. S. 276, 52 S Ct 556, 766, Ed 1102).

In *Henry* v. *State of Mississippi,* 379 U. S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408, this Court said: "It is, of course, a familiar principal that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions."

Here, because of the absence of an opinion, there was no specific judgment deciding a federal question. Certainly, as we show below, there were independent and adequate state grounds.

II

The was an independent, tenable, nonfederal question that could be the basis for the State court's action.

This litigation is concerned essentially with the right of a state government to determine what powers shall be possessed respectively by a village and a county. So long

as in the structuring of local governments the state violates no federal rights, the manner in which the state acts in this area is beyond the reach of the federal courts.

In New York villages generally possess the power to perform police functions. Counties generally do not. The state constitution (Article 9) and statutes (e.g. Municipal Home Rule Law) provide means whereby powers possessed by one form of local government can be transferred to another. Before one government gives up a basic function to another, the people have a right to vote on the question.

When the Suffolk County Charter was adopted, certain towns and villages simultaneously voted on the transfer to the county of their police function. One such town which did so was the Town of Brookhaven. At the time, the Village of Port Jefferson was not in existence. Subsequently that village was formed of a part of the Town of Brookhaven which had then transferred its police function to Suffolk County.

The people of the village now want their police function back. Considering this question, the Appellate Division of the Supreme Court said:

> "When the Town of Brookhaven elected to join the County Police District, its election was binding upon the residents of all the town's then unincorporated areas, including the area now included within the plaintiff village. By subsequently incorporating, the residents of the village did not acquire the right to a second vote on the question whether they should join the County Police District. Such second vote would, if permitted, give them unequal and greater rights than the residents of any other towns and villages, who are bound by their orig-

> inal votes; and it would allow them to renege on a commitment made on behalf of all the residents of the Town of Brookhaven when the majority of those residents, including themselves, voted to join the County Police District." (26 A.D. 2d 700, 272 N.Y.S. 2d 617; Appendix to Jurisdictional Statement, p. 19.)

The law which, as the appellants persistently but improperly put it, "took away" their rights, was Chapter 278 of the Law of New York 1958, a bill which created the Suffolk County Charter. The charter contained provisions for the constitution of the legislative body of the county which appellants contend violate the due process and equal protection clauses of the federal constitution.

Appellants contend the charter is inseverable, and that because Sections 201 and 203, the sections having to do with the constitution of the county's legislative body and the manner of voting (Jurisdictional Statement, A-2) are invalid, the entire charter must fall, and with it the law pursuant to which the area that became the plaintiff village gave up (pre-incorporation) its police functions.

The Appellate Division considered the question of severability, saying:

> "Considering the question pragmatically (People ex rel. Alpha P.C. Co. v. Knapp, 230 N.Y. 48, 60), and in light of all the circumstance of the enactment and adoption of the subject charter by an overwhelming majority of the votes of the entire county (including its populous western half which contained more than 90 per cent of the total county population, and which, according to the Bianchi decision, was discriminated against by section 203) we believe the invalidity of section 203 does not re-

> quire the striking down of the entire charter, since we cannot say that the charter would have been rejected had section 203 been exscinded and replaced by some other provision for the legislative body. Indeed, in view of the above-mentioned facts it may well be that the charter would have been adopted by an even more overwhelming majority were section 203 not in it. In our opinion then, the invalidity of section 203 does not invalidate the rest of the Charter." (26 A.D. 2d 700, 272 N.Y.S. 2d 617, Appendix to Jurisdictional Statements, p. 18).

This is clearly a ground—nonfederal—on which the Court of Appeals could have based its decision of affirmance, dismissing the complaint and petition.

While sometimes appellate courts in New York affirm without opinion "on the decision of the court below", or on the opinion of a particular judge, that state abides by the general rule that "affirmance of an order on appeal, without opinion, indicates that the correct result was reached, but does not indicate that the appellate court necessarily agreed with the reasoning which may have produced the decision * * *" (Vol 5B C.J.S. 559), *Scott & Co.* v. *Scott,* 186 App.Div. 518, 526, 174 N.Y.S. 583, 588; *In re Estate of Collins,* 20 Misc. 2d 283, 195 N.Y.S. 2d 898.

Since, then, the decision of the New York Court of Appeals could have been based on a finding the provisions of the Charter are severable, notwithstanding the possibility of the unconstitutionality of §§ 201 and 203, there is no sound and valid basis for finding probable jurisdiction. Indeed, appellees contend the appellants proper remedy was by way of certiorari rather than appeal.

We submit there was *not* "drawn in question the validity of a statute of [the] state on the ground of its being

repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity" and that therefore 28 U.S.C. § 1257(2) is not the proper route.

Even if this Court should dismiss the appeal but consider granting certiorari under 28 U.S.C. § 2103, we contend it should not do so. First, the basic federal question is already in the federal courts in the Bianchi case (argument before the United States Court of Appeals for the Second Circuit was had March 12, 1968), so that there is no reason to exercise the equitable power of the Court, and the absence of an opinion in the State's highest court fails to provide, with independent basis for the decision present, the necessary foundation.

CONCLUSION

As 28 U.S.C. § 1257(2) is interpreted by the decisions of this Court there is in this case no substantial federal question involved, and appellee's motion to dismiss the appeal should be granted.

Alternatively, the final judgment of the New York Court of Appeals should be affirmed on the ground that although a federal question was raised it was not expressly passed upon and there was an independent, tenable, nonfederal question that could be the basis for the judgment of New York's highest court.

Respectfully submitted,

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FREDERICK MARS,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

INCORPORATED VILLAGE OF PORT JEFFERSON ET AL. *v.* BOARD OF SUPERVISORS OF COUNTY OF SUFFOLK ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1152. Decided April 8, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.